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No. 10-

IN THE
Supreme Court of the United States

MISSOURI TITLE LOANS, INC.,
Petitioner,

v.

BEVERLY BREWER,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, preempts state law requiring the parties to consent to class-wide arbitration as a condition of enforcing an arbitration agreement?

II. Whether Missouri courts contravene the FAA by applying special state law contract principles to the enforcement of arbitration agreements?

CORPORATE DISCLOSURE STATEMENT

Community Loans of America, Inc., a privately held Georgia corporation, owns 100% of Missouri Title's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Missouri Title Loans, Inc. ("Missouri Title") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 323 S.W.3d 18. App. 1a. The opinion of the Missouri Court of Appeals Eastern District is unreported, but is available online at 2009 WL 4639899. App. 24a. The opinion of the trial court is unpublished and is not available on Westlaw. It appears at App. 33a.

JURISDICTION

The Court has jurisdiction of this petition pursuant to 28 U.S.C. § 1257(a). Although § 1257(a), on its face, permits review only of "[f]inal judgments or decrees," and an order remanding a case for trial is not final, *Laclede Gas Light Co. v. Public Service Comm'n*, 304 U.S. 398, 400 (1938), this Court has never given the statute a "mechanical" construction. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Rather, the Court has given the statute a "'practical rather than a technical construction.'" *Id.* at 478, *quoting Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).

Cox identified "four categories of . . . cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. Missouri Title respectfully submits that the questions presented in this petition fall with the fourth *Cox* category. That category has three requirements:

- The "federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court."
- "[R]eversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility

> of evidence in, the state court proceedings still to come."
>
> - A "refusal immediately to review the state court decision might seriously erode federal policy."

420 U.S. at 482-83.

This petition satisfies each of these categories. *First*, the Supreme Court of Missouri has finally determined that the arbitration provision is unenforceable because it does not affirmatively authorize class arbitration. If Missouri Title prevails on the remaining state law issues, it will have no standing to appeal. *Second*, if this Court grants the petition and reverses, there will be no more litigation other than summary procedures to confirm or set aside an arbitration award. *Third*, the Supreme Court of Missouri's holding directly contradicts the "liberal federal policy favoring arbitration" pursuant to which "any doubts . . . should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court held that *Cox* gave it jurisdiction to review an interlocutory state court order refusing to enforce an arbitration clause:

> For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate. We hold that the Court has jurisdiction to decide whether the Federal Arbitration Act preempts § 31512 of the California Franchise Investment Law.

465 U.S. at 7-8.

The petition is timely under Supreme Court Rule 13, in that the Supreme Court of Missouri issued its opinion on August 10, 2010, App. 1a, and denied rehearing on November 16, 2010, App. 49a. This petition is filed within 90 days of the latter date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution (Art. VI, cl. 2), provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the FAA, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

The questions presented raise important issues of FAA preemption. The first question is substantially similar to the question raised in *AT&T Mobility LLC v. Concepcion*, No. 09-983, which was argued before this Court on November 9, 2010. The Supreme Court of Missouri, like the Court of Appeals for the Ninth Circuit in *Concepcion*, refused to enforce a written arbitration provision governed by the FAA because enforcement of the provision would have required the consumer plaintiff to arbitrate her claims on an individual, rather than a class-wide, basis.

Because Missouri Title's arbitration provision contains a class action waiver expressly precluding class-wide arbitration, the Supreme Court of Missouri denied arbitration altogether. It reasoned that (a) with the class action waiver, Missouri Title's arbitration agreement was unconscionable under Missouri law and public policy (a determination that was itself violative of the FAA because it was not based upon generally applicable state law principles), (b) without the class action waiver, the arbitration agreement would be "silent" on the issue of class arbitration, (c) under *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010), class procedures cannot be imposed where the arbitration agreement is silent and (d) therefore, the arbitration agreement should be stricken in its entirety. The result is that Missouri Title must defend a class action in court, as if the arbitration agreement never even existed.

The Supreme Court of Missouri's construction of *Stolt-Nielsen* to deny arbitration altogether turns *Stolt-Nielsen* (and the FAA) on its head. If anything, *Stolt-Nielsen* supports enforcement of the class action

waiver. Since *Stolt-Nielsen* holds that, under the FAA, a silent arbitration agreement must be read as prohibiting class-wide arbitration, then *a fortiori* an arbitration provision that contains an express class action waiver must also be valid and enforceable under the FAA in order to effectuate the intent of the contracting parties.[1] Indeed, *Stolt-Nielsen*'s holding applies with even greater force in the context of the express class action waiver in this case since the parties *expressly* agreed to forego class arbitration in favor of individual arbitration. Thus, enforcing the parties' agreement not to participate in a class arbitration will "'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen*, __ U.S. at ___, 130 S. Ct. at 1774 (citation omitted). As Chief Justice Price of the Supreme Court of Missouri explained in his dissenting opinion in *Brewer*, "[b]ecause the majority invalidates the entire arbitration agreement, its result (class action litigation) is actually contrary to the result reached in *Stolt-Nielsen* (individual arbitration)." App. 19a. The FAA preempts state law that would condition the enforcement of an arbitration provision on consent to class arbitration, especially when the parties, as here, have expressly manifested their intent to forego class proceedings.

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[1] This Court implicitly recognized this when it vacated and remanded to the Second Circuit in *American Express Co. v. Italian Colors Restaurant*, __ U.S. __, 130 S. Ct. 2401 (2010), for further consideration in light of *Stolt-Nielsen* the Second Circuit's earlier opinion invalidating a class action waiver in an arbitration agreement between American Express and merchants honoring the American Express credit card.

The *Brewer* court held that there must be either class arbitration or no arbitration at all. That is precisely the paradigm in which the FAA should preempt state law. *See Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. App. 2001) (the Supremacy Clause "would preclude us from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action").

The second question presented also raises an important issue of FAA preemption. This Court has recognized narrow grounds for invalidating an arbitration agreement. Such agreements "may be invalidated by '*generally applicable contract defenses*, such as fraud, duress, or unconscionability.'" *Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772, 2776 (2010) (emphasis added) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). However, as *Casarotto* holds, the FAA preempts state law that holds out arbitration for special treatment. Here, among other things, the Supreme Court of Missouri contravened the FAA by applying a special unconscionability rule to the parties' arbitration provision. Although the general rule in Missouri is that a party seeking to establish that a contract is unconscionable must establish both procedural and substantive unconscionability, the *Brewer* Court held that when an arbitration contract is at issue, proof of either procedural or substantive unconscionability will suffice. As Chief Justice Price admonished in his dissenting opinion in *Brewer*, "[t]o the extent that the majority opinion invalidates the entire arbitration agreement in this case, without requiring a showing of procedural unconscionability, it departs from Missouri law." App. 17a.

STATEMENT OF THE CASE

1. Procedural History. Missouri Title is a title lender, a small loan lender, and a payday lender authorized to do business under Mo. Rev. Stat. § 367.500 (title), § 367.199 (small) and § 408.500 (payday). A title lender makes small, short-term loans to consumers secured by their certificate of title to an automobile. The statute imposes various disclosure requirements on title lenders, but it does not regulate the rate of interest that they charge.

The original plaintiff in this case, Althea Peete, alleges that in May 2006, she borrowed $608.50 from Missouri Title for a period of 30 days. The loan agreement contained a binding arbitration provision that prohibited Ms. Peete from participating in a class action or class arbitration.

In January 2007, Ms. Peete filed a class action petition in the circuit court of the City of St. Louis alleging various violations of the Title Lending statute. She also alleged violations of the Missouri Merchandising Practices Act (the "MMPA"), Mo. Rev. Stat. § 407.010, *et seq.* Section 408.025.1 of the MMPA authorizes an award of attorneys' fees to a successful plaintiff and the lawsuit sought such relief.

In February 2008, Ms. Peete filed an amended pleading, joining Beverley Brewer and Anthony Pipkins as plaintiffs. The allegations in the amended petition, including the prayer for attorneys' fees, did not materially vary from the first one. In June 2008, Ms. Peete dismissed her claims without prejudice and Ms. Brewer and Mr. Pipkins continued as plaintiffs.

Although all three of these plaintiffs had signed arbitration provisions prohibiting them from filing or participating in a class action, the petition sought class certification pursuant to Rule 52.08 of the Missouri Rules of Civil Procedure. Count I of each petition sought a declaratory judgment that the ban on class actions was unconscionable under Missouri law and should therefore be stricken. Missouri Title cross-moved to stay or dismiss the action and to compel arbitration. Missouri Title argued that the FAA preempted plaintiffs' claims of unconscionability.

At a hearing on these motions, plaintiff Brewer presented affidavits from three Missouri attorneys to the effect that no private lawyer would accept her claim, even given the availability of statutory attorneys' fees, because of its relatively small size. Missouri Title subsequently learned that one of those attorneys had himself filed four low dollar cases on behalf of individual consumers under the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, between 1999 and 2007. The FDCPA also has a statutory attorneys' fees clause for prevailing plaintiffs.

The trial court agreed with Brewer that the class-action waiver was unconscionable. It rejected Missouri Title's argument that "the arbitration provision should be enforced pursuant to" the FAA, because "Plaintiff's arguments based on unconscionability constitute a proper challenge" to the arbitration provision. App. 37a-38a. The trial court severed the class action waiver from the rest of the arbitration provision, ordered the case to arbitration and directed the arbitrators to consider "whether plaintiff satisfies the requisite criteria for this matter

to proceed as a class arbitration." App. 40a. Pursuant to Missouri Rule 74.04(b), the trial court certified its judgment with respect to Count I as final for purposes of appeal. App. 40a.

Missouri Title appealed the judgment to the Missouri Court of Appeals. Missouri Title argued that the FAA "preempts the trial court's decision" on class arbitration. App. 31a. The Court of Appeals disagreed, holding that "Missouri law is clear that state law contract defenses, such as unconscionability, may be used to invalidate arbitration agreements without contravening the FAA." App. 31a. The Court of Appeals affirmed the trial court's judgment requiring class-wide arbitration. App. 32a.

Upon Missouri Title's application, the Supreme Court of Missouri accepted transfer of the case. Missouri Title again argued that the FAA "preempts the trial court's decision." App. 2a. By a 4-3 margin, that Court held that the class action waiver was unconscionable because of the alleged "limitation it placed" on plaintiffs' "ability to retain counsel." App. 9a. The majority opinion held that "generally applicable state law contract defenses such as fraud, duress and unconscionability may be used to invalidate all or part of an arbitration agreement without contravening the FAA." App. 3a.

Shortly before the case was argued in the Supreme Court of Missouri, this Court issued its opinion in *Stolt-Nielsen*. *Stolt-Nielsen* held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." __ U.S. at __, 130 S. Ct. at 1775 (emphasis original).

The majority opinion in the Supreme Court of Missouri acknowledged that *Stolt-Nielsen*'s "rationale would preclude Missouri Title Loans from being forced to submit to class arbitration." App. 4a. The majority opinion concluded:

> [B]ecause Brewer proved that the class arbitration waiver was unconscionable, the unavailability of class arbitration under the FAA means that the entire arbitration agreement is rendered unconscionable. Given that class arbitration is not an option in this case, the only way to remedy the unconscionability in this case is to strike the entire arbitration agreement.

App. 9a-10a.

Three judges, including the Chief Justice, dissented. They reasoned that because the amount at issue was more than $4,000 and penalties and attorneys' fees were available, it was not impossible for Brewer to secure counsel. While the inability to pursue a class action "may diminish the amount of attorney's fees available," it "does not substantively or practically bar her [Brewer] from an adequate remedy." App. 18a.

The dissent also concluded that the majority's result was completely inconsistent with *Stolt-Nielsen*:

> *Stolt-Nielsen* does *not* hold that state courts may no longer sever class waivers without voiding the entire arbitration agreement . . . . According to *Stolt-Nielsen*, if the parties do not in some way demonstrate an affirmative intent to engage in *class* arbitration, they will proceed to *individual* arbitration. Clearly, then, the Supreme Court is not instructing state courts to invalidate in its

> entirety any arbitration agreement that provides for individual arbitration . . . .

App. 18a-19a (emphasis original).

2. The FAA. The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements . . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288 (2002) (citation omitted). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem. Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983). Accordingly, Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. FAA Section 2 creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). It "command[s] that an arbitration agreement is enforceable just as any other contract . . . ." *Vaden v. Discover Bank*, __ U.S. __, 129 S. Ct. 1262, 1275 (2009).

A contractual provision barring class-wide arbitration does not vitiate the entire arbitration agreement. To the contrary, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 20 (emphasis by the Court); *accord*, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"). This Court has instructed that the unavailability of class procedures does not justify invalidation of an arbitration agreement unless Congress itself has demonstrated an intention

to prohibit an agreement that provides exclusively for individual arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (construing arbitration clause in the context of a claim under the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*). Likewise, just last Term, this Court held in *Stolt-Nielsen* that courts and arbitrators may not impose their own policies favoring class actions on parties that had not expressly contracted for class-wide arbitration.

The core mandate of the FAA is to enforce private arbitration agreements according to their specific terms. *See Stolt-Nielsen*, __ U.S. at __, 130 S. Ct. at 1773 ("the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms'"). The Supreme Court of Missouri, however, erroneously concluded that the FAA should yield to the policy of the Missouri courts that agreements providing for individual arbitration can be invalidated as "unconscionable" under state law simply because, in the view of the Missouri courts, the unavailability of class action procedures will result in insufficient deterrence of violations of the law. Moreover, it invalidated the class action waiver and arbitration agreement using a standard for "unconscionability" that applies uniquely to arbitration agreements and that is not a "generally applicable contract defense." *Rent-A-Center*, __ U.S. at __, 130 S. Ct. at 2776. Thus, it does not provide a basis for the revocation of "any contract." The Supreme Court of Missouri's decision subverts the practical value of arbitration and the policy of the FAA to resolve disputes swiftly and inexpensively in accordance with private arbitration agreements.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE SAME FAA PREEMPTION QUESTION THAT IS PRESENTLY UNDER ADVISEMENT IN *AT&T MOBILITY LLC V. CONCEPCION*

The following question is presently before this Court in *AT&T Mobility LLC v. Concepcion*:

> [w]hether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures – here, class-wide arbitration – when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.

This question is also determinative of the Supreme Court of Missouri's ruling herein. Brewer can recover her attorneys' fees and costs if she prevails on her claims under the MMPA in an individual arbitration. Nevertheless, the Supreme Court of Missouri denied arbitration based upon the wholly speculative conclusion that "it would not be financially viable for an attorney because of the complicated nature of the case and the small damages at issue" to represent Brewer on an individual basis in arbitration. App. 29a-30a. As discussed *infra* at 18-19 and 28-29, such reasoning is empirically flawed. Importantly, moreover, it contravenes the FAA and reflects the same anti-arbitration bias employed by the California state and federal courts that is presently being reviewed in *Concepcion*.

Here, class procedures are not necessary to ensure that Brewer can effectively vindicate her individual claims in arbitration. Section 407.025 of the MMPA provides for the recovery of attorneys' fees and

punitive damages by the successful plaintiff. The purpose of a statutory attorneys' fee award is to provide lawyers "with incentive to prosecute" cases that "they would otherwise be unable or unwilling to afford." *American Civil Liberties Union v. Miller*, 803 S.W.2d 592, 598-99 n.2 (Mo. banc) (Blackmar, J., dissenting) (*quoting Ramos v. Lamm*, 703 F.2d 546, 552 (10th Cir. 1983)), *cert. denied*, 500 U.S. 943 (1991)). Moreover, "an award of attorney's fees may be proper even if the prevailing party suffered only nominal damages." *Turner v. Shalberg*, 70 S.W.3d 653, 660 (Mo. App. 2002). *Accord, Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 523 (Mo. banc 2009) ("[i]n human rights cases, the amount of the verdict or judgment may have little bearing on the amount of attorneys' fees").

Most of the cases addressing the issue have held that statutory attorneys' fee provisions provide sufficient incentive for lawyers to take consumer cases even without the availability of class arbitration. The Third Circuit has held that the ability to recover attorneys' fees and costs is a very powerful incentive for an attorney to represent a consumer on an individual basis in pursuing small dollar claims against a company.[2] *See Johnson v. West Suburban Bank*, 225

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[2]Although the arbitration provision herein states that the parties will be responsible for their own attorneys' fees and costs, that would not preclude the arbitrator from awarding Brewer attorneys' fees and costs if she prevails in an individual arbitration. The arbitration provision identifies the American Arbitration Association ("AAA") as the arbitration administrator, and both the AAA's Rules (Consumer Rule C-7(c)) and its Consumer Due Process Protocol, No. 14, require the arbitrator to apply substantive law and empower the arbitrator to grant whatever relief would be available in court. *See also Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009)

F.3d 366, 374 (3d Cir. 2000) (holding that an arbitration clause that prohibited class actions would not choke off the supply of lawyers willing to represent Truth in Lending Act ("TILA") debtors because TILA, 15 U.S.C. § 1601, *et seq.*, permits successful plaintiffs to recover attorneys' fees), *cert. denied*, 531 U.S. 1145 (2001). Obviously, this incentive is even more powerful in the present case, where the alleged damages are not "nominal."

Numerous courts concur with and have followed the Third Circuit's analysis in *Johnson*. *See, e.g.*, *Jenkins v. First American Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005) (court enforced class action waiver in arbitration agreement between consumer and payday lender, holding that where arbitration agreement permits fee shifting if allowed by applicable law and preserves the parties' substantive remedies, lawyers will be willing to represent the consumer on an individual basis and the company will not be immunized against unlawful conduct), *cert. denied*, 546 U.S. 1214 (2006); *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1261-62 (M.D. Ala. 2003) (rejecting argument that class action was necessary for plaintiff to vindicate her statutory rights because plaintiff could recover her attorneys' fees and costs if successful in the arbitration); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631,

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(Third Circuit compelled individual arbitration before AAA notwithstanding similar fee language in arbitration provision); *Dabney v. Option One Mortg. Corp.*, No. Civ. A. 00-5831, 2001 WL 410543, at *10 (E.D. Pa. April 19, 2001) (although arbitration clause stated that each party would bear its own attorneys' fees and costs, the AAA rules "contain safeguards protecting plaintiffs from inordinately high arbitration costs" in that they, *inter alia*, "permit the arbitrator to include payment of litigation expenses in an award").

638-39 (4th Cir. 2002) (rejecting argument that plaintiff "will be unable to maintain her legal representation given the small amount of her individual damages" where statute permitted fee-shifting), *cert. denied*, 537 U.S. 1087 (2002); *Ornelas v. Sonic-Denver T, Inc.*, No. 06-cv-00253, 2007 WL 274738, at *5-7 (D. Colo. Jan. 29, 2007) (enforcing class action waiver where statutes permitted fee-shifting and following the "numerous courts [that] have recognized that [class action waivers] are valid and fully enforceable"); *Galbraith v. Resurgent Capital Services*, No. Civ. S. 05-2133 KJM, 2006 WL 2990163 (E.D. Cal. Oct. 19, 2006) (class action waiver not unconscionable where plaintiff could recover attorneys' fees if successful). The *Gipson* court emphasized:

> The Supreme Court has explained that "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." .... This concern, however, is not present in an individual suit seeking damages under statutory provisions that provide prevailing plaintiffs with multiple damages, costs and attorneys' fees, because the existence of these remedies provides parties and lawyers with incentives to pursue their cases .... Indeed, the central purpose behind statutory attorneys fees is to encourage lawyers to accept cases in which damages may be small or nominal .... [T]his court cannot conclude that either the Plaintiff or her attorneys are so lacking in economic incentive to warrant a

> finding that Cross Country's class action prohibition is unconscionable.

294 F. Supp. 2d at 1262 (citation omitted).

Underscoring this point, there are numerous reported cases in which a sizeable attorneys' fee was awarded even though the plaintiff's individual recovery was relatively small. *See, e.g.*, *Dee v. Sweet*, 460 S.E.2d 110 (Ga. Ct. App. 1995) (awarding $258,360 in attorneys' fees and $1.00 in actual damages); *Ex parte Edwards*, 601 So. 2d 82 (Ala. 1992) ($43,000 in attorneys' fees regarding $2,544 note); *Johnson v. Eaton*, 958 F. Supp. 261, 264 (M.D. La. 1997) ($13,410 fee award, nearly 27 times damage award); *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ($20,000 attorney fee; $0 actual damages and $100 of statutory damages).

Moreover, the overwhelming majority of TILA lawsuits filed each year are individual, not class action, lawsuits, even though the vast majority of suits involve small dollar claims and class actions are permitted under TILA. TILA permits successful plaintiffs to recover their attorneys' fees and costs. 15 U.S.C. § 1640(a). According to computer searches of the LexisNexis CourtLink® database, 945 TILA cases, of which only 17 were class actions, were filed in the federal courts in 2010; 1360 TILA cases, of which only 40 were class actions, were filed in 2009; 784 TILA cases, including only 51 class actions, were filed in 2008; 705 TILA cases, of which only 40 were class actions, were filed in 2007; 688 TILA cases, of which only 17 were class actions, were filed in 2006; 492 TILA cases, of which only 19 were class actions, were filed in 2005; 574 TILA cases, including only 20 class actions, were filed in 2004; 513 TILA cases, of which only 39 were class actions, were filed in 2003;

and 576 TILA cases, of which only 37 were class actions, were filed in 2002.[3] This confirms that consumers are able to find attorneys to represent them on an individual basis in small dollar claims where the consumer, if successful, can recover attorneys' fees and costs.

Furthermore, numerous courts have flatly refused to find class action waivers in arbitration agreements unconscionable when presented with "attorney affidavits" similar to those cited by the *Brewer* court. App. 8a. *See, e.g.*, *Gipson*, 294 F. Supp. 2d at 1262 ("[T]he Plaintiff has submitted affidavits from several attorneys who state that 'the amount and cost of attorney time that would be required to competently handle the matter, whether by arbitration or lawsuit, would far exceed the value of any potential individual recovery whether the case was handled on an hourly or percentage (contingent) basis' . . . . This argument is unpersuasive" because of the availability of statutory attorneys' fees); *accord*, *Battels v. Discover Bank*, No. 2:03cv238A, 2004 US Dist. LEXIS 28012, at *35-40 (M.D. Ala. Aug. 27, 2004); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1342 (M.D. Ala. 2003); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1274 (M.D. Ala. 2003); *Strand v. U.S. Bank Nat'l Assoc., N.D.*, 693 N.W.2d 918, 926-27 (N.D. 2005) ("Strand points to no empirical evidence that all attorneys would be unwilling to litigate these claims . . . . Although the unavailability of a class action or class

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[3] TILA provides for statutory damages, typically ranging from $100 to $2,000, plus actual damages and attorneys' fees. 15 U.S.C. § 1640(a). Actual damages are nearly impossible to prove because plaintiffs must show detrimental reliance. *Turner v. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001) (citing cases), *cert. denied*, 534 U.S. 820 (2001).

arbitration may make recovery of damages less convenient for the purported class as a whole, under the facts of this case the arbitration provision between Strand and the Bank creates a chance that Strand can be made whole through individual arbitration").

Therefore, this case, like *Concepcion*, squarely presents the important federal issue whether states may be permitted to override the FAA by requiring parties to submit to class arbitration as a condition of enforcing their arbitration agreements, when the consumer plaintiff can fully vindicate her statutory rights in an individual arbitration.

II. THE SUPREME COURT OF MISSOURI'S RULING CONFLICTS WITH THE FAA, DECISIONS OF THIS COURT AND THE VAST MAJORITY OF FEDERAL AND STATE APPELLATE COURT OPINIONS ON THE VALIDITY OF CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

The ruling of the Supreme Court of Missouri is a judicial attempt to advance what it perceives to be consumer-friendly public policy at the expense of the FAA and in spite of the Supremacy Clause. If not reversed, this ruling will unquestionably result in a "significant narrowing of the application of the FAA" in Missouri. *Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007). The FAA's scope of application is a policy decision that belongs to "Congress and not the courts," and courts cannot "apply state law . . . to interfere with the appropriate application of the FAA." *Id.*

The Supremacy Clause preempts state law if it "conflicts with, or frustrates, federal law." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663 (1993). The ruling in the court below clearly frustrates federal law. The court's refusal to enforce consumer arbitration clauses that do not affirmatively consent to class arbitration – its attempt to avoid *Stolt-Nielsen* by stripping arbitration from consumer contracts – directly conflicts with the FAA. It exhibits the very judicial hostility to arbitration (cloaked in public policy terms) that the FAA was intended to abolish.

In *Gilmer*, this Court addressed whether to require individual arbitration of a claim under the ADEA, even though the ADEA expressly authorizes class claims. It held that, under the FAA, arbitration agreements must be enforced "in the manner provided for in [the arbitration] agreement," 9 U.S.C. § 4, unless "Congress itself has evinced an intention to preclude" such arbitration. 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). This is true "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Gilmer*, 500 U.S. at 32. Consistent with *Gilmer*, most federal courts of appeals,[4] including the Eighth

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[4] *See, e.g., Gay*, 511 F.3d at 395 (enforcing individual arbitration of a $39.92 claim under the federal Credit Repair Organizations Act, 15 U.S.C. § 1679, *et seq.*, and the Pennsylvania Credit Services Act, 73 Pa. Cons. Stat. Ann. § 2181, *et seq.*, as a matter of Pennsylvania and Virginia law and stating that a contrary result would be preempted by the FAA); *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th Cir. 2007) (enforcing class action waiver and compelling arbitration of federal antitrust claims); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (enforcing

Circuit which encompasses Missouri,[5] and many state appellate courts[6] have regularly enforced arbitration

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class action waiver under Louisiana law and suggesting that the FAA would preempt state law if it invalidated the class action waiver); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001) (suggesting that there is no non-waivable right to maintain a class action under TILA, RICO or Kentucky law), *cert. denied*, 535 U.S. 970 (2002); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553 (7th Cir. 2003) (enforcing a class action waiver based on the FAA principle that arbitration agreements must be enforced in accordance with their terms); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (finding a class action waiver not unconscionable under Georgia law and suggesting that the FAA would preempt state law if it invalidated class action waivers), *cert. denied*, 547 U.S. 1128 (2006).

[5] Prior to *Brewer*, the Eighth Circuit, applying Missouri law, twice upheld class action waivers in consumer arbitration agreements. *See Cicle v. Chase Bank, USA*, 583 F.3d 549 (8th Cir. 2009) (holding that class action was not unconscionable under Missouri law or contrary to the public policy permitting class actions under the MMPA); *Pleasants v. American Express Co.*, 541 F.3d 853 (8th Cir. 2008) (holding that class action waiver was not unconscionable under Missouri law because of fee-shifting feature in TILA and the fact that the class action waiver was, as here, prominently disclosed).

[6] *See, e.g.*, *Rosen v. SCIL, LLC*, 799 N.E. 2d 488 (Ill. Ct. App. 2003) (class action waiver not unconscionable under Illinois law); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (Table) (Kan. Ct. App. 2005) (class action waiver not unconscionable under Kansas law); *Stenzel v. Dell, Inc.*, 870 A.2d 133 (Me. 2005) (class action waiver not unconscionable under Texas law); *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005) (upholding validity of class action waivers in light of "the strong policy made clear in both federal and Maryland law that favors the enforcement of arbitration provisions"); *Tsadilas v. Providian National Bank*, 786 N.Y.S.2d 478 (N.Y. App. Div. 2004) (class action waiver not unconscionable or contrary to public policy); *Strand v. U.S. Nat'l Bank, N.A.*, 693 N.W.2d 918 (N.D. 2005) ("Merely restricting the availability of a class action is not, by

agreements which contain class action waivers. In contrast, the *Brewer* court rejected individual arbitration based on the speculation that the plaintiff would not be able to vindicate her statutory rights in an individual arbitration because of the inability to find a lawyer to handle an alleged small claim. That result is clearly wrong under *Gilmer* because nothing in the FAA evidences any congressional intent to preclude agreements to arbitrate exclusively on an individualized basis. Moreover, speculation is not a ground for refusing to enforce an arbitration agreement. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

The Supreme Court of Missouri's decision is also flatly inconsistent with this Court's decision in *Stolt-Nielsen*. In *Stolt-Nielsen*, the Court held that, under the terms of the parties' agreement, the arbitration had to take place on an individual basis because "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." __ U.S. at __, 130 S. Ct. at 1775 (emphasis by the Court). The Court precluded class arbitration because the parties had "reached 'no agreement' on that issue." *Id.* *Stolt-Nielsen* thus reaffirmed the FAA's "fundamental" principle that "'arbitration is a matter of

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itself, a restriction on substantive remedies. The right to bring an action as a class action is purely a procedural right"); *Hawkins v. O'Brien*, No. 224900, 2009 WL 50616 (Ohio Ct. App. Jan. 9, 2009) (upholding validity of class action waiver in a payday lender's arbitration provision); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E. 2d 886 (Ill. Ct. App. 2003) (class action waiver not unconscionable under Arizona law); *Spann v. American Express Travel Related Services Co., Inc.*, 224 S.W. 3d 698 (Tenn. Ct. App. 2006) (class action waiver not unconscionable under Utah law).

consent, not coercion,'" *id.* at 1782 (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)), and that parties are therefore "'free to structure their arbitration agreements as they see fit.'" *Id.* at 1763 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). The contrary rule of the Supreme Court of Missouri, which permits the abrogation of the parties' arbitration agreement based on the state court's own perception of public policy, must yield to that fundamental principle. Indeed, the Court in *Stolt-Nielsen* expressly stated that the FAA requires courts "to interpret and enforce a contract, not to make public policy." *Id.* at 1767. Here, the Supreme Court of Missouri erred in giving precedence to Missouri public policy judgments over the arbitration agreement of the parties. It not only erroneously concluded that class action waivers are invalid "exculpatory clauses," but admonished Missouri Title for not informing its consumer borrowers that "the net result of the waiver is that the lender effectively is immunized from liability." App. 10a. Instead of respecting the parties' agreement for non-class arbitration as required by the FAA, the Supreme Court of Missouri dispensed what this Court in *Stolt-Nielsen* called its "'own brand of industrial justice.'"

Review is necessary, not merely to correct the profound legal errors of the Missouri Supreme Court, but to bring clarity on issues that have led *Brewer* and other (mostly state) courts to depart from the mainstream and invalidate class action waivers in arbitration agreements based on state public policy grounds.[7] This Court implicitly recognized this

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[7] *See, e.g.*, *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. App. 4th Dist. 2002) (class action waiver unconscionable

conflict, and the need to resolve it, by granting certiorari in *Concepcion*. If the conflict is not resolved in favor of FAA preemption, other courts will be encouraged to follow the *Brewer* Court's example and elevate state public policy over the fundamental federal principles embodied in the FAA. As this Court emphasized in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995):

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9

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under California law and public policy), *cert. denied*, 537 U.S. 1226 (2003); *Keefe v. Allied Home Mortgage Corp.*, No. 5-07-0463, 2009 WL 2027244 (Ill. Ct. App. July 10, 2009) (class action waiver unconscionable even though borrower was given option to decline signing the stand-alone arbitration agreement and still obtain the loan); *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88 (N.J. 2006) (invalidating class action waiver in context of low-value consumer claim in adhesive contract), *cert. denied*, 549 U.S. 1338 (2007); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008) (class action waiver contravenes New Mexico's fundamental public policy of encouraging the resolution of small consumer claims); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006) (class action waiver in customer agreement unconscionable as a matter of Pennsylvania public policy); *Herron v. Century BMW*, 693 S.E.2d 394 (S.C.) (class action waiver contravenes public policy expressed in South Carolina Regulation of Manufacturers, Distributors and Dealers Act), *cert. filed*, Aug. 31, 2010 (No. 10-315); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) (class action waiver undermines public policy of Washington Consumer Protection Act); *see also Fenterstock v. Education Finance Partners*, 611 F.3d 124 (2d Cir. 2010) (invalidating class action waiver based upon California law); *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009) (invalidating class action waiver based upon New Jersey law).

U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.

III. MISSOURI COURTS CONTRAVENE THE FAA BY DISCRIMINATING AGAINST ARBITRATION PROVISIONS IN PRACTICE

This Court has clearly held that a state court may not treat an arbitration clause "in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987). Both the Supreme Court of Missouri and the various districts of the Courts of Appeals pay lip service to this principle, as did the trial court in the instant case. In practice, however, at least in the context of consumer rights and employment cases, Missouri courts apply much stricter standards to arbitration clauses than to other types of contracts, thereby singling out arbitration agreements for special treatment clearly prohibited by *Perry*. *See Casarotto*, 517 U.S. at 687.

A. For example, as discussed above, the opinion in the instant case found the arbitration clause to be substantively unconscionable based on Brewer's alleged "inability to retain counsel" due to the small amount of damages at issue, which "leaves the consumer with no meaningful avenue of redress[]." App. 9a. The opinion in a companion case reached the same result for the same reason. *Ruhl v. Lee's*

Summit Honda, 322 S.W.3d 136, 139-40 (Mo. banc 2010).

Like most consumer protection laws, the MMPA provides for an award of reasonable attorneys' fees to the prevailing plaintiff. The Supreme Court of Missouri, however, held that the "opportunity to recover attorney fees is not sufficient to prevent finding a class waiver unconscionable." *Ruhl*, 322 S.W.3d at 140, *citing Woods v. QC Fin. Services*, 280 S.W.3d 90, 97-98 (Mo. Ct. App. 2008). The rationale of *Woods* is that the availability of such relief "is illusory if it is unlikely that counsel would be willing to undertake the representation." 280 S.W.3d at 97.

These holdings are obviously pretextual. In the first place, *Woods* begs the question. The issue is whether the availability of statutory attorneys' fees makes it likely that an attorney will take a low-value case to arbitration. Since the definition of a "reasonable attorney's fee" is "a fee that is sufficient to induce a capable attorney to undertake the representation," *Perdue v. Kenny A*, __ U.S. __, 130 S. Ct. 1662, 1672 (2010), the answer should be clear. As one leading commentator has urged:

> The prospect of a fee recovery may make even a case seeking small monetary damages attractive to an attorney. Thus, in evaluating the amount at stake in arbitration (and thus whether the claim is economical to bring), a court must consider not only the damages sought by the claimant but also any possible attorneys' fee recovery.

Drahozal, "Arbitration Costs and Contingent Fee Contracts," 59 Vand. L. Rev. 729, 772 (2006). With-

out reason, the Supreme Court of Missouri declined to follow that rule.

In the second place, these holdings are demonstrably false in the context of Missouri legal practice. In *Wages v. Young*, 261 S.W.3d 711 (Mo. Ct. App. 2008), private counsel represented plaintiff in an MMPA claim over a $1,800 auto repair. In *Kirby v. Grand Crowne Travel Network, LLC*, 229 S.W.3d 253 (Mo. Ct. App. 2007), private counsel represented plaintiffs in an MMPA dispute over $3,389 in actual damages. In *Walsh v. Al West Chrysler, Inc.*, 211 S.W.3d 673 (Mo. Ct. App. 2007), private counsel filed an MMPA claim in which plaintiffs had sustained no benefit of the bargain damages and sought only the value of their time in searching for another vehicle. In *Woods v. Mehlville Chrysler-Plymouth, Inc.*, 198 S.W.3d 165 (Mo. Ct. App. 2006), the MMPA dispute was over $500. Private counsel represented plaintiff in two separate lawsuits over this sum.

And these cases, representing published appellate opinions, are just the tip of the iceberg. In 2009, according to the Office of State Courts Administrator, Missouri circuit courts disposed of more than 35,000 civil cases (excluding domestic relations cases). The courts of appeals issued slightly more than 1,000 opinions in civil cases that year, many in domestic relations cases. So the published opinions represent substantially less than 3% of the total civil cases. There must be hundreds of other, unappealed low-dollar MMPA cases in which plaintiffs were represented by private counsel.

A cursory review of PACER shows that one of plaintiff's experts in *Brewer,* Dale Irwin, regularly litigates low-dollar cases in the United States District Court for the Western District of Missouri on behalf

of consumers under statutes that authorize attorneys' fees to a prevailing plaintiff:

- *McCallister v. A&S Collections Associates, Inc.*, No. 4:99-cv-01156, filed December 6, 1999. The complaint alleged a violation of the FDCPA in attempting to collect an alleged $274.87 debt. The complaint does not allege any economic damages.

- *Clark v. D.A.N. Joint Venture III, L.P, et al.*, No. 4:05-cv-1191, filed on November 23, 2005. The complaint alleged a violation of the FDCPA in attempting to collect a time-barred debt. The only economic damages alleged are attorneys' fees in an unspecified amount.

- *Davis v. Landmark Dodge, Inc.*, No. 4:06-cv-145, removed from state court on February 21, 2006. The complaint alleged a violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, in connection with an alleged theft of credit information. It alleged no specific economic damages, just damage to reputation and time and inconvenience.

- *Chernoff v. Nationwide Credit, Inc.*, No. 4:07-cv-301, removed from state court on April 17, 2007. The complaint alleged a violation of the FDCPA that allegedly caused plaintiffs to incur an additional $1,000 in interest.

Counsel to Missouri Title subscribes to a daily online service listing the kinds of cases filed in the United States District Court for the Eastern District of Missouri, as well as the parties and the plaintiff's counsel. Between July 1, 2010 and December 16, 2010, private counsel filed 99 FDCPA cases on behalf of individual plaintiffs in that one judicial district. There was one FDCPA class action during that period in the Eastern District of Missouri.

Accordingly, the Missouri Supreme Court's finding that reasonable attorneys' fees are insufficient incentive to induce lawyers to take small consumer cases to arbitration is obviously unworthy of credence. In other contexts, this Court has held that such proof "is one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

As the dissent in the instant case noted, Missouri courts have not been nearly as solicitous of the concerns for a negative value claim by taxpayers for refunds of illegal taxes. App. 18a. In *Charles v. Spradling*, 524 S.W.2d 820 (Mo. banc 1975), there was no question that taxes had been illegally charged and the amounts at issue were less than $10. In declining to allow a class action, the Supreme Court of Missouri turned a deaf ear to arguments that an individual claim "would cost more than it is worth." 524 S.W.2d at 822.

Missouri courts have held that provisions limiting the manufacturer's liability to a return of the price paid are valid unless unconscionable and noted many cases finding no unconscionability. *Bracey v. Monsanto Co.*, 823 S.W.2d 946, 950 (Mo. banc 1992). While that limitation obviously impacts the plaintiff's ability to obtain legal counsel, nothing in *Bracey* suggests that it is a controlling, or even a relevant, factor in the unconscionability analysis.

Similarly, Missouri courts have held that a consumer can prospectively release his or her right to recover for a seller's negligence, provided only that the release uses that term. *Alack v. Vic Tanny Int'l*, 923 S.W.2d 330, 337 (Mo. banc 1996); *Vergano v. Facility Management of Missouri, Inc.*, 895 S.W.2d

126 (Mo. App. 1995). The necessity to prove reckless conduct in such cases doubtless provides a disincentive for a lawyer to take such a case, but that disincentive is not among the factors Missouri courts consider in enforcing such agreements.

B. In every other context, "Missouri has always required a showing of both procedural and substantive unconscionability before a court will void a contract." *Ruhl*, 322 S.W.3d at 140 (Price, C.J., dissenting), and cases there cited. Only three Missouri cases find contract provisions unconscionable based solely on the substance: the instant case ("Missouri law does not require" proof of "both procedural and substantive unconscionability," App. 7a); *Ruhl*, 322 S.W.3d at 139-40 (discussing only substantive unconscionability); and *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858-59 (Mo. banc 2006) (same). All three cases involve arbitration clauses.

C. For decades, Missouri courts have held that continued at will employment is sufficient consideration for a non-compete clause. By 1933, the proposition was "well established." *City Ice & Fuel Co. v. Snell*, 57 S.W.2d 440, 442 (Mo. App. 1933). *Accord*, *Reed, Roberts Associates, Inc. v. Bailenson*, 537 S.W.2d 238, 241 (Mo. App. 1976) ("mutual promises of the parties as to continued employment . . . is sufficient consideration" for non-compete); *Computer Sales Int'l, Inc. v. Collins*, 723 S.W.2d 450, 452 (Mo. App. 1986) ("continued employment for 2½ years of an at-will employee, does constitute sufficient consideration" for a non-compete); *Easy Returns Midwest, Inc. v. Schultz*, 964 S.W.2d 450, 454 (Mo. App. 1998) ("employer's continuation of employment . . . supplies adequate consideration" for a non-compete).

Missouri courts have applied this rule in a wide variety of other contexts. *Whelen Security Co. v. Allen*, 26 S.W.3d 592, 596 (Mo. Ct. App. 2000) (forum selection clause); *Earl v. St. Louis University*, 875 S.W.2d 234, 237 (Mo. Ct. App. 1994) (severance pay); *Schmalz v. Hardy Salt Co.*, 739 S.W.2d 765, 767-68 (Mo. Ct. App. 1987) (release); *Logue v. City of Carthage*, 612 S.W.2d 148, 151 (Mo. Ct. App. 1981) (sick leave benefits).

In *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. Ct. App. 2008), however, the Missouri Court of Appeals held that continued at will employment "does not constitute legal consideration" for an arbitration agreement. 273 S.W.3d at 29. The opinion expressly refused to apply the long-established rule in non-compete cases to arbitration clauses. *Id.* at 28-29. Accord, *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 427 (Mo. Ct. App. 2010) ("the at-will employment relationship does not constitute legal consideration for an employer's request that an employee give up their right of access to the courts") (internal punctuation omitted).

Unlike other Missouri opinions, *Morrow* does not even try to hide its contempt for arbitration. It regards the arbitration clause as "presumptively invalid . . . until Hallmark has demonstrated a legitimately protectible business interest served by precluding access to the courts by former employees." 273 S.W.3d at 29. The federally protected interest in "the simplicity, informality, and expedition of arbitration," *Gilmer*, 500 U.S. at 31, evidently does not qualify and is ignored.

The bottom line is simple. Missouri courts may pretend to treat arbitration clauses in the same fashion as other contracts, although occasionally, as

in *Morrow*, the mask slips. Missouri courts do not *in fact* treat arbitration clauses fairly and the instant case is a perfect illustration.

Justice Scalia's dissent from the denial of certiorari in *Allen v. Lawhorn*, __ U.S. __, 131 S. Ct. 562 (2010), is worth noting. Missouri's dismissive attitude toward arbitration clauses, at least in consumer rights and employment cases, is not "an isolated judicial error." __ U.S. at __, 131 S. Ct. at 565. "With distressing frequency," Missouri courts "refuse to be governed by Congress' command" that arbitration clauses be treated equally with other contracts. *Id.* An order reversing the Supreme Court of Missouri in this case should bring this practice to an end.

CONCLUSION

For the foregoing reasons, Petitioner Missouri Title Loans, Inc. respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MISSOURI
en banc

No. SC90647

BEVERLY BREWER,
Respondent,

vs.

MISSOURI TITLE LOANS, INC.,
Appellant.

Appeal from the Circuit Court of St. Louis County
Honorable David L. Dowd, Judge

Opinion issued August 31, 2010

Missouri Title Loans, Inc., appeals a judgment finding that a class arbitration waiver contained in its loan agreement is unconscionable and unenforceable. The judgment is affirmed in part and reversed in part. The case is remanded.

FACTS

Beverly Brewer borrowed $2,215 from Missouri Title Loans. She signed a loan agreement, promissory note and security agreement. The loan was secured by the title to Brewer's 2003 Buick Rendezvous. The annual percentage rate on the loan was 300 percent. The loan agreement included language requiring individual arbitration and a waiver of Brewer's right to class arbitration.

Brewer filed a class action petition against Missouri Title Loans alleging violations of numerous statutes, including the Missouri merchandising practices act. Missouri Title Loans filed a motion to dismiss or to stay the claims and to compel Brewer to arbitrate her claims individually. The trial court entered a judgment finding the class arbitration waiver in the loan agreement unconscionable and unenforceable. The court ordered the claim to proceed to arbitration to determine whether it was suitable for class arbitration. Missouri Title Loans appeals.

ANALYSIS

Missouri Title Loans raises three points on appeal. It asserts that the federal arbitration act ("FAA") preempts the trial court's decision, that the class arbitration waiver was not unconscionable, and that the waiver is a valid and permissible exculpatory clause under Missouri law.

I. Standard of Review

The trial court heard evidence on the record at a hearing on Missouri Title Loans' motion. The judgment will be affirmed if it is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 94 (Mo. App. 2008). The issue of whether a dispute is subject to arbitration is subject to de novo review. *Id.*

II. Federal Arbitration Act

The FAA, 9 U.S.C. section 1, *et seq.*, provides that valid arbitration agreements that affect interstate commerce must be enforced unless an exception applies. *Kansas City Urology, P.A. v. United Healthcare Servs.*, 261 S.W.3d 7, 10-11 (Mo. App. 2008). Although the FAA is drafted to favor the enforcement

of arbitration provisions, generally applicable state law contract defenses such as fraud, duress and unconscionability may be used to invalidate all or part of an arbitration agreement without contravening the FAA. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. 2003) (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

The interplay between Brewer's state law unconscionability defense and the FAA is informed by the recent decision in *Stolt-Nielsen v. Animal-Feeds International Corp.*, 130 S.Ct. 1758, 1776 (2010). In *Stolt-Nielsen*, the Supreme Court held that where an arbitration agreement is silent with respect to class arbitration, the parties cannot be compelled to submit the dispute to class arbitration. The Court premised its holding on the notion that arbitration is fundamentally a matter of consent, and, as a result, an arbitrator's authority over claims and parties is limited by the scope of the arbitration agreement. *Id.* at 1774-1775. Therefore, "it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding the party agreed to do so." *Id.* at 1775. Because the parties in *Stolt-Nielsen* had reached no agreement on the issue of class arbitration, there was no contractual basis for concluding there was consent to class arbitration. *Id.* Without consent, the arbitrator lacked the authority to act. *Id.*

In this case, the arbitration contract was not silent with respect to class arbitration. To the contrary, a central aspect of the arbitration contract between Missouri Title Loans and Brewer was the class arbitration waiver that Brewer is seeking to invalidate. With the waiver, Missouri Title Loans expressly withheld its consent to class arbitration. Although

Stolt-Nielsen is factually distinguishable from this case because it involved sophisticated international business entities, the fact remains that the Supreme Court's analysis is premised on the concept of consent. Missouri Title Loans expressly withheld its consent to class arbitration. Were this Court to strike the class action waiver clause, the result would be an agreement that was silent as to class arbitration. As *Stoltz-Nielsen* requires an affirmative consent to class arbitration before it may be compelled, its rationale would preclude Missouri Title Loans from being forced to submit to class arbitration.

The conclusion that Missouri Title Loans cannot be compelled to participate in class arbitration does not mean that Brewer must submit to individual arbitration. The trial court found that the class arbitration waiver was unconscionable and unenforceable and ordered the case to proceed to arbitration for a determination of whether class arbitration is appropriate. In effect, the trial court, consistent with prior Missouri cases, severed what it found to be an unconscionable clause (the class arbitration waiver) from the otherwise enforceable arbitration contract. Under *Stolt-Nielsen*, however, class arbitration is not an option in this case because Missouri Title Loans expressly withheld its consent to class arbitration, and absent an express agreement to class arbitration, class arbitration is not an option.

For this reason, simply invalidating the class waiver would not remedy the unconscionable aspects of the arbitration contract should this Court agree that denial of the right to proceed on a class basis is unconscionable on these facts. That is because were the class waiver simply invalidated and severed from the remainder of the arbitration contract, Brewer

then would be required to submit to individual arbitration. If this Court were to agree with the trial court that, on the facts of this case, individual arbitration is not economically practical or feasible because the amount in controversy is so small in relationship to the risks and costs involved that a reasonable attorney would not take the case, however, then individual arbitration would not be a feasible remedy. This difficulty could be avoided only by permitting litigation of this matter as part of a class action, and as there is no affirmative agreement to class arbitration, the class action must proceed in court. This is not surprising, for one of the rationales behind allowing class actions is to permit suit to be brought on a class basis where it is not economically or practically feasible to do so on an individual basis. *Wood*, 280 S.W.3d at 98.

This is not to say that an arbitration agreement is always unconscionable merely because there is no agreement to class arbitration; *Stolz-Nielson* demonstrates that requiring individual arbitration can be reasonable and enforceable. It is only when the practical effect of forcing a case to individual arbitration is to deny the injured party a remedy—because a reasonable attorney would not take the suit if it could not be brought on a class basis either in court or through class arbitration—that a requirement for individual arbitration is unconscionable. The Court, therefore, turns to the facts of this case to see whether the individual arbitration agreement imposed by Missouri Title Loans was unconscionable here.

III. Unconscionability

An unconscionable arbitration provision in a contract will not be enforced. *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856-61 (Mo. banc 2006)

(invalidating as unconscionable arbitration clauses requiring the consumer to pay for all arbitration fees and allowing an entity related to one of the parties to select the arbitrator); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308-314 (Mo. App. 2005) (invalidating as unconscionable an arbitration provision barring consumer claims from being raised as class actions). There are procedural and substantive aspects to unconscionability. Procedural unconscionability relates to the formalities of the making of an agreement and encompasses, for instance, fine print clauses, high pressure sales tactics or unequal bargaining positions. *Woods*, 280 S.W.3d at 94 (citing *Whitney*, 173 S.W.3d at 308). Substantive unconscionability refers to undue harshness in the contract terms. *Whitney*, 173 S.W.3d at 308 (quoting *Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. 1979)).

A number of decisions from the Missouri court of appeals have held that there must be both procedural and substantive unconscionability before a contract or a clause can be voided. *See Woods*, 280 S.W.3d at 94. These cases characterize the test for unconscionability as a balancing test or "sliding scale" between the substantive and procedural aspects. *Whitney*, 173 S.W.3d at 308. This general rule provides an acceptable analytical framework for most cases because a party who employs procedurally unconscionable bargaining tactics usually does so with the goal of inducing the other party into a one-sided contract. Nonetheless, there are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone. For instance, in *Schneider*, this Court did not address procedural unconscionability and, instead, determined that as the arbitration clause at issue

was substantively unconscionable, it was void. 199 S.W.3d at 858-59. Although *Schneider* did not hold expressly that it is unnecessary to find both procedural and substantive unconscionability, the analysis in the case supports the conclusion that Missouri law does not require the party claiming unconscionability to prove both procedural and substantive unconscionability. Under Missouri law, unconscionability can be procedural, substantive or a combination of both.[1]

The evidence in this case supports the trial court's determination that the class arbitration waiver is unconscionable. With respect to procedural unconscionability, there was evidence that the loan agreement was non-negotiable and difficult for the average consumer to understand and that Missouri Title Loans was in a superior bargaining position. As

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[1] Cases from other jurisdictions are split on the issue of whether a party must prove both procedural and substantive unconscionability to void a contract or clause. In *Maxwell v. Fidelity Financial Services, Inc.*, 907 P.2d 51, 59 n.3 (Ariz. 1995), the court noted decisions in Utah, New York and New Hampshire expressly holding that a contract can be voided on grounds of unconscionability without finding both procedural and substantive unconscionability. *See Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985)("gross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability"); *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829 (N.Y. 1988) ("while determinations of unconscionability are ordinarily based on the court's conclusion that both the procedural and substantive components are present ... there have been exceptional cases where a provision of a contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone"); *American Home Improvement v. MacIver*, 201 A.2d 886, 889 (N.H. 1964) (holding a contract unconscionable due to substantial price to value disparity).

Brewer notes, this evidence is virtually identical to *Woods*, 280 S.W.3d at 96, in which the court of appeals affirmed a judgment finding that a class arbitration waiver provision contained in payday lender's loan contract was unconscionable. As in the present case, the evidence in *Woods* demonstrated that the lender was in a superior bargaining position because the high-interest loan agreement was offered to people in financial distress on a take-it or leave-it basis. As in *Woods*, there is sufficient evidence in this case to support the trial court's finding of procedural unconscionability.

Brewer also introduced substantial evidence of substantive unconscionability. Brewer presented expert testimony from three consumer lawyers who testified it was unlikely that a consumer could retain counsel to pursue individual claims. John Ammann, a professor from St. Louis University School of Law, testified that it would be very hard, "if not impossible," for a consumer to find counsel to handle a claim under the loan agreement because it is a complicated area of law. Such a claim would require significant expertise and discovery; therefore, it would not be financially viable for an attorney because of the complicated nature of the case and the small damages at issue. Bernard Brown, another expert testifying on behalf of Brewer, testified it would be "exceedingly difficult," if not "outright rare," to find representation for individual claims. The final expert, Dale Irwin, testified that the likelihood of an individual finding an attorney to represent him or her was "virtually nil" because of the small damages and the likelihood of a "heavily defended" defendant such as Missouri Title Loans.

Brewer's evidence is similar to the class action waiver held unconscionable in *Woods*. The *Woods* court found that class action waiver and arbitration provision substantively unconscionable based on the limitation it placed on Woods's ability to retain counsel to pursue a cause of action. The inability to retain counsel leaves the consumer with no meaningful avenue of redressing complicated statutory and common law claims.[2] *Id.* at 97, 98. The net result of class arbitration waivers in consumer contracts involving small amounts of money is that "'[a] company [that] wrongfully exacts a dollar from each of millions of customers will reap a handsome profit [and] the class action is often the only effective way to halt and redress such exploitation.'" *Id.* at 97 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1105 (2005)). Therefore, the *Woods* court determined there was sufficient evidence to support a finding of unconscionability. *Id.* at 99. As was the case in *Woods*, the net result of the class arbitration waiver in this case is that Brewer effectively forfeited legal counsel in any claim that arose under the loan agreement. To hold otherwise would allow lenders to continue unfair lending practices "since none of its customers would have a practical remedy to bring about a stop to the conduct." *Whitney*, 173 S.W.3d at 310. Furthermore, because Brewer proved that the class arbitration waiver was unconscionable, the unavailability of class arbitration under the FAA means that the entire arbitration agreement is rendered unconscionable. Given that class arbitration is

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[2] Section 407.025 of the Missouri merchandising practices act authorizes the recovery of attorney fees. As such, the legislature anticipated that consumers need an attorney for successful vindication of the rights extended by the MMPA.

not an option in this case, the only way to remedy the unconscionability in this case is to strike the entire arbitration agreement.

IV. Exculpatory Clause

In its final point on appeal, Missouri Title Loans argues that the class arbitration waiver is permissible because it functions as an unambiguous exculpatory clause. A defendant cannot exculpate itself from liability unless the language is clear and unambiguous. *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 334 (Mo. banc 1996). Missouri Title Loans asserts that the class arbitration waiver is clear and unambiguous and that the average consumer would understand that he or she is giving up the right to class arbitration. This argument is without merit because the real issue is not whether the consumer realizes he or she is forsaking class arbitration but, instead, is whether the consumer realizes that he or she effectively is bypassing the opportunity to retain counsel to litigate a claim against the lender. The net result is that the class arbitration waiver effectively immunizes the loan company from liability, creating an economic impediment to the consumer's retention of counsel for litigating his or her claim. *See Woods*, 280 S.W.3d at 99. Nothing in the language of the class arbitration waiver unambiguously informs the consumer that the net result of the waiver is that the lender effectively is immunized from liability. As was the case in *Woods*, the class arbitration waiver here will not be enforced as a valid exculpatory clause.

CONCLUSION

The judgment finding the class arbitration waiver unconscionable is affirmed. The judgment is reversed,

however, to the extent that it severs the class arbitration waiver and requires an arbitrator to determine the propriety of class arbitration. Given the FAA's prohibition of class arbitration under the facts of this case and the fact that the unconscionable aspects of the arbitration contract are a result of the class arbitration waiver, the appropriate remedy is to strike the arbitration agreement in its entirety. The case is remanded.

Richard B. Teitelman, Judge

Russell, Wolff and Stith, JJ., concur; Price, C.J., dissents in separate opinion filed; Fischer, J., concurs in opinion of Price, C.J.; Breckenridge, J., dissents in separate opinion filed.

SUPREME COURT OF MISSOURI
en banc

No. SC90647

BEVERLY BREWER,
Respondent,

vs.

MISSOURI TITLE LOANS, INC.,
Appellant.

DISSENTING OPINION

I.

This case involves a collision between two valid public policy goals—consumer protection and freedom of contract. It is appropriate to regulate business interests from exploiting unwary, unsophisticated consumers. Yet Missouri law also recognizes the great value of freedom of contract, where parties may bargain both price and terms to their mutual benefit and then are held accountable for the agreement made.

The majority opinion holds that the class arbitration waiver in the title loan contract is unconscionable and then strikes the arbitration agreement in its entirety because it "effectively immunized" the lender from liability. I dissent because Ms. Brewer did not establish that the contract, and the arbitration agreement contained therein, was procedurally unconscionable or that the class action waiver was substantively unconscionable.

II.

The Federal Arbitration Act instructs states to enforce arbitration clauses unless they can be invalidated by ordinary contract principles: "An agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. sec. 2. However, Missouri courts will not enforce unconscionable contracts. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 99 (Mo. App. 2008); *Kansas City Urology P.A. v. United Healthcare Services*, 261 S.W.3d 7, 14 (Mo. App. 2008); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. App. 2005); *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. 2003). An unconscionable contract is an agreement "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Smith v. Kriska*, 113 S.W.3d 293, 298 (Mo. App. 2003).[1]

Section 400.2-302(1), RSMo, provides that

> If the court as a matter of law finds that the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

This statute has been used to guide Missouri courts in making determinations of unconscionability regarding arbitration agreements. *Vincent v. Schneider*,

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[1] It is not clear what definition of "unconscionability" the majority is using.

194 S.W.3d 853 (Mo. banc 2006). As in any ordinary contract analysis, the parties' intentions control. *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1763 (2010) (quoting *Mitsubishi Motors Corp. v. Solder Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)); *Dunn Industrial Group Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003) ("The usual rules and canons of contract interpretation govern the . . . validity of an arbitration clause").

III.

Under Missouri law, a contract will not be voided for unconscionability unless it is both procedurally and substantively unconscionable. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 531 (Mo. banc 2009) (Norton, J., concurring); *Repair Masters Const. Co., Inc. v. Gary*, 277 S.W.3d 854, 858 (Mo. App. 2009); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 559 (Mo. App. 2009); *Kansas City Urology*, 261 S.W.3d at 15-16; *Woods*, 280 S.W.3d at 95; *Whitney*, 173 S.W.3d at 308; *Funding Systems Leasing Corp. v. King Louie International*, 597 S.W.2d 624, 634 (Mo. App. 1979); *Cicle v. Chase Bank USA*, 583 F.3d 549, 554 (8th Cir. 2009); *Pleasants v. American Express Company*, 541 F.3d 853, 857 (8th Cir. 2008). Procedural unconscionability deals with the formalities of making the contract (such as high pressure sales tactics, unreadable fine print, or misrepresentation). This analysis focuses on whether the parties had a voluntary and sufficient meeting of the minds to bind each other to the terms of the writing. Substantive unconscionability deals with the terms of the contract itself (such as whether the terms are unduly harsh). This analysis focuses on whether the terms are so one sided that they are unenforceable as a matter of public policy. *State ex rel. Vincent v.*

Schneider, 194 S.W.3d 853, 858 (Mo. banc 2006) (citing *Bracey v. Monsanto Co. Inc.*, 823 S.W.2d 946, 950 (Mo. banc 1992)).[2] Courts are rightly hesitant to substitute their judgment for that of freely acting parties. That is why a showing of procedural unconscionability is necessary—it flags circumstances in which one of the parties may not have freely consented to the bargain.

The majority argues that Vincent discarded the long-standing Missouri requirement of procedural unconscionability for invalidating a contract or the entirety of an arbitration agreement. *Vincent* did not go so far.

In *Vincent*, this Court found that plaintiffs had not proven that the contract was unenforceable as an adhesion contract. *Id.* at 857-58. The Court also refused to impose a mutuality requirement or strike the arbitration agreement as a whole. *Id.* at 859. Taking guidance from section 400.2-302, the Court then proceeded to determine that two sub-parts of the arbitration agreement, a cost-shifting provision and a provision governing selection of the arbiter, were unconscionable. *Id.* at 863. The rest of the arbitration agreement, however, was enforced. *Id.* at 861.

While *Vincent* did strike two sub-parts of the arbitration agreement, it did not disturb the Missouri requirement that a contract or an arbitration agreement be both procedurally and substantively unconscionable before a court will void either in its entirety. *Cicle*, 583 F.3d at 554 (citing *Whitney*, 173 S.W.3d at 308) ("Before a contract will be deemed unenforceable on the grounds of unconscionability, a

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[2] A 300 percent interest rate in any loan agreement is certainly suspect. However, that is not the issue before us.

court applying Missouri law must find it both procedurally and substantively unconscionable."). In *Vincent*, the Court enforced the basic agreement of the parties to arbitrate, merely blue-penciling the substantively unconscionable provisions. *See, e.g., Mid-States Paint & Chemical Co. v. Herr*, 746 S.W.2d 613, 616 (Mo. App. 1988) (citing *R.E. Hayrington Inc. v Frick*, 428 S.W.2d 945) ("Under the blue pencil doctrine, if a restrictive covenant contains words which are unreasonable limitations and if stricken would leave a reasonable contract, the court may 'blue pencil' or strike those words out."); *Sigma v. Chemical Co. v. Harris*, 794 F.2d 371 (8th Cir. 1986).

To determine whether an agreement is procedurally unconscionable, an examination of the process is necessary. *Whitney*, 173 S.W.3d at 308. In this case, there is absolutely no evidence that Missouri Title Loans engaged in coercive or high-pressure sales tactics. There is evidence, however, that the class arbitration waiver was in all caps and in bold font. The fact that Ms. Brewer thought it was "not important" for her to read the loan agreement before signing it does not mean that the process was procedurally unfair. *See, e.g., Vincent*, 194 S.W.3d at 857 ("Relators cannot simply allege [unconscionability] and offer no other proof on the matter.").

Undoubtedly, Missouri Title Loans was in a better bargaining position than Ms. Brewer. Undoubtedly, the loan agreement between Missouri Title Loans and Ms. Brewer was "a non-negotiated form contract." However, not all non-negotiated form contracts are unconscionable contracts of adhesion. *Cicle*, 583 F.3d at 554 ("These sorts of take-it-or-leave-it agreements between businesses and consumers are used all the time in today's business world. If they were all

deemed to be unconscionable and unenforceable . . . or if individual negotiation were required to make them enforceable, much of commerce would screech to a halt"). When a party offers no proof that she was unable to look elsewhere for a more attractive contract, or that all the area's title loan companies use the same class arbitration waivers, this Court ought not invalidate the parties' freely entered-into agreement. *Id.*; *Vincent*, 194 S.W.3d at 857 (the weaker party must show she was unable to look elsewhere for a better option); *Robin v. Blue Cross Hospital Services, Inc.*, 637 S.W.2d 695, 697 (Mo. banc 1982). Here, Brewer stated that there was nothing stopping her from looking elsewhere for a loan agreement with different or more favorable terms. In fact, before dealing with Missouri Title Loans, she compiled a list of 20 competing companies that offered the same services. Ms. Brewer nowhere claimed that all of these companies used the same standard form contract or that they included the same class arbitration waiver in their agreements. Ms. Brewer failed to prove that the contract she decided to enter into with Missouri Title Loans was procedurally unconscionable.

To the extent that the majority opinion invalidates the entire arbitration agreement in this case, without requiring a showing of procedural unconscionability, it departs from Missouri law.

IV.

Admittedly, the majority does not invalidate the arbitration clause in one step. Instead, it argues a two-step analysis. First, the majority determines that the class action prohibition in the arbitration clause is substantively unconscionable because it deprives plaintiffs of a practical remedy. And second, because the newly decided Supreme Court case of

Stolt-Nielsen refuses to allow class arbitration unless it is expressly provided for in an arbitration agreement, the majority concludes that the entire arbitration agreement must go. I disagree with both steps of the argument.

A.

The initial amount in controversy in this case approximated $4,000. This amount continues to increase as interest accrues. In addition, there are possible penalties and fees that might be collected on Ms. Brewer's behalf. Despite the testimony of Ms. Brewer's expert witnesses, this is not an amount that can be considered *de minimis* as a matter of law. The removal of Ms. Brewer's right to arbitrate on a class basis may diminish her bargaining power and may diminish the amount of attorney's fees available, but it does not substantively or practically bar her from an adequate remedy for any harm she has suffered. *Charles v. Spradling*, 524 S.W.2d 820,824 (Mo. 1975), is directly on point in this regard and directly contrary to the argument set out in the majority opinion.

B.

The majority opinion also draws an unwarranted conclusion from *Stolt-Nielsen*. *Stolt-Nielsen* simply holds that when an arbitration agreement is silent with respect to class arbitration, the parties cannot be compelled to class arbitration. Rather, arbitration must proceed on an individual basis. 130 S.Ct. at 1776. *Stolt-Nielsen* does not hold that state courts may no longer sever class waivers without voiding the entire arbitration agreement. In fact, the Supreme Court does not disfavor agreements that compel individual arbitration in any way. To the contrary, individual arbitration is the default. According to

Stolt-Nielsen, if the parties do not in some way demonstrate an affirmative intent to engage in *class* arbitration, they will proceed to *individual* arbitration. Clearly, then, the Supreme Court is not instructing state courts to invalidate in its entirety any arbitration agreement that provides for individual arbitration, especially where arbitration—in some form—was contemplated by the parties. The driving rationale of *Stolt-Nielsen* is to give effect to the parties' intent. At a circuit court hearing in this case, Ms. Brewer's counsel stated: "I'll be very clear. We are not fighting arbitration." Because the majority invalidates the entire arbitration agreement, its result (class action litigation) is actually contrary to the result reached in *Stolt-Nielsen* (individual arbitration).

V.

Finally, class waivers in arbitration agreements are enforceable. *Woods*, 280 S.W.3d at 98; *Ross-Langford v. Mercantile Town Mut. Ins. Co.*, 71 S.W. 720, 723 (Mo. App. 1902). The Eighth Circuit has twice upheld this proposition, *see Cicle v. Chase Bank, USA*, 583 F.3d 549 (8th Cir. 2009), and *Pleasants v. American Exp. Co.*, 541 F.3d 853 (8th Cir. 2008), as has the Third Circuit in *Gay v. Creditinform*, 511 F.3d 369 (3rd Cir. 2007). And in general, Missouri has a preference for arbitration. *Dunn Industrial Group Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). I recognize that there are valid reasons to balance the bargaining power between strong business interests and relatively weak individual consumers, especially in the small loan industry where difficult circumstances often drive what appear to be one-sided deals. However, consumer protection measures always come at a price. Additional

business or litigation costs for the small loan industry may result in even higher rates being charged to credit-challenged borrowers or their abandonment of this high risk market altogether. This type of public policy balancing is best left to the legislature and not to the courts. *See, e.g.*, § 407.025 of the Missouri Merchandising Practices Act. I would enforce the arbitration agreement.

WILLIAM RAY PRICE, JR., CHIEF JUSTICE

SUPREME COURT OF MISSOURI
en banc

No. SC90647

BEVERLY BREWER,
Respondent,

vs.

MISSOURI TITLE LOANS, INC.,
Appellant.

DISSENTING OPINION

I join Chief Justice Price in dissenting from the majority opinion because the facts in this case do not support a finding of unconscionability. However, I write separately because I do not agree with his finding that both procedural and substantive unconscionability are always required to find a contract unenforceable. I believe that issue has not been sufficiently resolved in Missouri. Moreover, because the issue is not necessary to the resolution of the present case, it should be left for another day.

Courts in other jurisdictions have held that a contract must be both procedurally and substantively unconscionable for a contract to be invalidated. 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 1998); 7 JOSEPH M. PERILLO, CORBIN ON CONTACTS § 29.4 (Revised ed. 2002). Accordingly, a number of courts have refused to apply the doctrine of unconscionability when there is merely procedural unconscionability but no showing of substantive unconscionability. 1 E. ALLEN FARNSWORTH,

FARNSWORTH ON CONTRACTS § 4.28 (3rd ed. 2004). Likewise, courts have held that substantive unconscionability, standing alone, is insufficient to invalidate a contract. *Id.* This appears to be the conclusion reached by the court of appeals. *See Repair Masters Const. Co., Inc. v. Gary*, 277 S.W.3d 854, 858 (Mo. App. 2009); *Kansas City Urology P.A. v. United Healthcare Services*, 261 S.W.3d 7, 15-16 (Mo. App. 2008).

Other courts, however, have found a contract unenforceable on the basis of only substantive unconscionability in exceptional circumstances where the substantive unfairness in the contract is egregious. 1 FARNSWORTH ON CONTRACTS § 4.28; 8 WILLISTON ON CONTRACTS § 18:10; 7 CORBIN ON CONTACTS § 29.4. The majority opinion contends that one of this Court's prior decisions, *State ex rel. Vincent v. Schneider*, supports that conclusion. 194 S.W.3d 853 (Mo. banc 2006).

In *Schneider*, this Court considered whether an arbitration agreement in a real estate contract was unconscionable. *Id.* at 859-61. Ultimately, the Court found the arbitration agreement to be unconscionable on two substantive bases, but did not find procedural unconscionability. *Id.* at 861. However, in so ruling, the Court did not analyze the differing view of other courts or recognize that it was overruling court of appeals cases to the contrary.

The majority and dissenting opinions disagree over the significance of *Schneider*. In this case, the majority finds that *Schneider* implies that a strong finding of substantive unconscionability alone is sufficient to invalidate an unfair contractual provision. The Chief Justice's dissent, on the other hand, believes that *Schneider* did not purport to overrule the requirement that a contractual provision must be

both procedurally and substantively unconscionable and, therefore, the law articulated by the court of appeals remains effective.

I do not believe it is necessary to the holdings of either the majority or dissenting opinions to decide whether *Schneider* should be interpreted as rejecting prior court of appeals decisions holding that both procedural and substantive unconscionability are needed to invalidate an unfair contractual provision. Such a decision is unnecessary to the Chief Justice's dissent because it finds the arbitration waiver in Ms. Brewer's case to be enforceable, a conclusion with which I agree. Likewise, a decision as to whether both procedural and substantive unconscionability are needed is unnecessary to the majority opinion because the majority finds the class arbitration waiver in Ms. Brewer's case to be both procedurally and substantively unconscionable. Consequently, because it is unnecessary to the resolution of this case to determine if *Schneider* overruled prior precedent, the issue of whether substantive unconscionability alone is sufficient to invalidate a contract should be left for resolution in future cases.

I also write separately because I believe that a contract provision waiving class action arbitration, like any other contract provision, may be unconscionable under certain circumstances. However, as discussed by Chief Justice Price, the facts in this case do not support a finding of unconscionability.

PATRICIA BRECKENRIDGE, JUDGE

APPENDIX B

MISSOURI COURT OF APPEALS,
EASTERN DISTRICT,
DIVISION THREE.

No. ED 92569.

BEVERLY BREWER,
Respondent,

v.

MISSOURI TITLE LOANS, INC.,
Appellant.

Dec. 8, 2009.

Application for Transfer
to Supreme Court Denied Jan. 12, 2010.
Sustained and Cause Ordered
Transferred March 2, 2010.
Transferred to 2010 WL 3430411.

OPINION

GLENN A. NORTON, Presiding Judge.

Missouri Title Loans, Inc. appeals the judgment finding a class arbitration waiver contained in its loan agreement unconscionable and unenforceable. We affirm.

I. BACKGROUND

Beverly Brewer went to Missouri Title Loans to borrow $2,215.00. In obtaining the loan she signed a loan agreement, promissory note, and security agreement. The loan was secured by the title to Brewer's 2003 Buick Rendezvous. The finance charges for the thirty-day loan were $564.37, which translated to annual percentage rate of roughly 300 percent. The loan agreement contained language purporting to require individual arbitration and waive Brewer's right to class arbitration, among other things. Brewer filed a class action petition against Missouri Title Loans[1] based on the company's trade practices in issuing loans. She alleged violations of numerous statutes and the Missouri Merchandising Practices Act. Missouri Title Loans filed a motion to dismiss or to stay the claims and compel Brewer to arbitrate her claims individually based on the language in the loan agreement. After a hearing, the trial court ultimately entered judgment partially granting Missouri Title Loans' motion and ordering that the matter proceed to arbitration to determine whether the claim meets the criteria for class arbitration. In its judgment, the trial court found the class arbitration waiver in the loan agreement unconscionable and unenforceable. The trial court found no just reason for delay and denominated its judgment final for purposes of appeal. Missouri Title Loans now appeals.

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[1] Althea Peete and Anthony Pipken were also named as plaintiffs in the original filing; however, Peete and Pipken subsequently dismissed their claims and Brewer proceeded with the action.

II. DISCUSSION

A. Standard of Review

Here, the trial court heard evidence on the record at a hearing on Missouri Title Loans' motion. Thus, our review is the same as in any other court-tried case–we affirm the decision unless is it not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 94 (Mo. App. E.D. 2008). In addition, our review of the arbitrability of a dispute is de novo. *Id.* "Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate." *Id.*

B. There was Sufficient Evidence to Support the Trial Court's Conclusion of Unconscionability

In its first point on appeal, Missouri Title Loans argues there was insufficient evidence to support the trial court's finding that the class arbitration waiver was unconscionable. There are procedural and substantive aspects of unconscionability. *Woods*, 280 S.W.3d at 94. Procedural unconscionability generally focuses on the contract formation process. *Id.* at 95. It concerns factors such as high pressure exerted on the parties, misrepresentation, or unequal bargaining positions. *Id.* Substantive unconscionability refers to undue harshness in the contract terms themselves. *Id.* There must be both procedural and substantive unconscionability before a provision can be considered unenforceable; however, there can be a balancing of the two aspects of unconscionability. *Id.* If gross procedural unconscionability exists, not much evidence is required of substantive unconscionability and vice versa. *Id.*

1. There was Sufficient Evidence of Procedural Unconscionability

Missouri Title Loans argues there was insufficient evidence of procedural unconscionability because there was no pressure or misrepresentation used to force Brewer to obtain the loan from Missouri Title Loans.[2] In response, Brewer relies upon our Court's analysis in *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. E.D. 2008) to argue there was sufficient evidence of procedural unconscionability. The *Woods* case is instructive. In *Woods*, our Court considered whether a class arbitration waiver provision contained in a payday lender's loan contract was unconscionable. *Id.* As in the present case, with respect to evidence of procedural unconscionability, the lender in *Woods* argued it did not use misrepresentations or other pressure to induce Woods to sign the contract, and therefore there was no evidence of procedural unconscionability. *Id.* at 95. The Court responded to the lender's argument by emphasizing that the bargaining position of the parties was an important consideration regarding procedural unconscionability. *Id.* at 96. The Court concluded the lender was in a superior bargaining position because the contract was presented on a take it or leave it basis in a situation where people were borrowing money at a high interest rate. *Id.* As a result, there was sufficient evidence to support a finding of procedural unconscionability. *Id.*

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[2] Missouri Title Loans also relies heavily on *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006), to argue there was insufficient evidence of procedural unconscionability. We find the Court's holding in *Vincent* is inapplicable to facts of this case.

Here, the loan agreement was presented in a take it or leave it fashion, as the agreement in *Woods* was. In addition, as in *Woods*, there was evidence in this case that Missouri Title Loans was in a much superior bargaining position. *See Woods*, 280 S.W.3d at 96. Missouri Title Loans is a large company with fifty stores in Missouri. Brewer is an individual seeking to borrow money with applicable finance charges amounting to a high interest rate. During the hearing before the trial court, Terry Fields, the designated corporate representative for Missouri Title Loans, testified customers cannot negotiate the terms of the arbitration clause in the loan agreement. The waiver at issue here is contained in a form contract presented to the borrowers, and as stated above, cannot be negotiated. Given the positions of the parties and considering the evidence discussed above, Missouri Title Loans was in a far superior position than Brewer with regard to the loan agreement. Because the lender was in a superior bargaining position, the contract was presented on a take it or leave it basis, and Brewer was borrowing money at what amounted to a high interest rate, here, as in *Woods*, there was sufficient evidence of procedural unconscionability. *See Woods*, 280 S.W.3d at 96.

2. There was Sufficient Evidence of Substantive Unconscionability

Missouri Title Loans also claims the evidence did not support the trial court's finding of substantive unconscionability. According to Missouri Title Loans, the trial court improperly concluded the class arbitration waiver was substantively unconscionable based on practical considerations concerning representation and notice. We disagree.

The Court in *Woods* also considered evidence of substantive unconscionability. 280 S.W.3d at 96. The *Woods* Court noted we are to consider the "reasonable expectations of the average consumer" when evaluating a form contract such as the loan agreement at issue here. *Id.* "Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed at the time the contract was made." *Id.* If the contract terms are so one-sided as to be oppressive, or there is an overall imbalance in the rights and obligations imposed, substantive unconscionability is indicated. *Id.* The Court in *Woods* considered the class action waiver and arbitration provision substantively unconscionable based upon the limitation it placed upon Woods's ability to attract counsel to pursue a cause of action, effectively leaving the consumer with no meaningful avenue of redress. *Id.* at 97, 98. This Court stated that by prohibiting class arbitration, the lender bars customers from joining together to seek relief that would be impractical for them to obtain individually. *Id.* at 98. As such, there was sufficient evidence to support a finding of unconscionability. *Id.* at 99.

Here, there was significant evidence presented concerning the fact that individual claims pursuant to the loan agreement would not be likely to attract counsel. John Ammann, a professor from St. Louis University School of Law, testified as an expert on behalf of Brewer. According to Ammann, it would be very hard, "if not impossible" for a consumer to find counsel to handle a claim under the loan agreement because it is a complicated area of law. Such a claim would require significant expertise and discovery, and therefore it would not be financially viable for an attorney because of the complicated nature of the

case and the small damages at issue. Bernard Brown, another expert testifying on behalf of Brewer, stated it would be a problem for consumers to obtain representation for individual claims. Brown testified it would be "exceedingly difficult," if not "outright rare" to find representation for individual claims. According to Brown, the arbitration waiver provision was a "major impediment" to individual claims pursuant to the loan agreement. Finally, Dale Irwin, a third expert, opined that the likelihood of an individual finding an attorney to represent him or her was "virtually nil" because of the small damages and the likelihood of a "heavily defended" defendant, such as Missouri Title Loans. As a result of the expert testimony, there was sufficient evidence to establish that the arbitration waiver would likely limit accessibility to representation for individual claims against Missouri Title Loans.[3] Therefore, there was sufficient evidence to support the trial court's conclusion that the provision was substantively unconscionable.

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[3] We note that in the *Woods* case, this Court recited the lender's argument that the trial court's decision relied "in large measure" upon experts' testimony that they would not take a case with damages as small as Woods's. 280 S.W.3d at 98. The Court noted it was not convinced the trial court relied "in large measure" upon such testimony, and stated regardless, it did not. *Id.* In the present case, the evidence supporting a finding of substantive unconscionability was largely established by expert testimony. However, the testimony supporting a finding of unconscionability in this case was not about what the individual experts themselves would or would not do. Instead, the experts testified as to what their opinion was regarding what other counsel would generally do and provided specific reasons for those opinions.

3. Conclusion

There was sufficient evidence of both procedural and substantive unconscionability to support the trial court's conclusion that the class arbitration waiver was unconscionable and unenforceable. Point one is denied.

C. The Trial Court's Decision was not Preempted by the Federal Arbitration Act

In its second point on appeal, Missouri Title Loans claims the Federal Arbitration Act ("FAA") preempts the trial court's decision because the court's finding that the waiver was unconscionable was not based upon grounds existing in law or equity for the revocation of any contract. We disagree.

Missouri law is clear that state law contract defenses, such as unconscionability, may be used to invalidate arbitration agreements without contravening the FAA. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003). Thus, Missouri Title Loans's argument fails, and point two is denied.

D. The Class Arbitration Waiver Improperly Immunized Missouri Title Loans from Liability

In its third point on appeal, Missouri Title Loans argues that to the extent the class arbitration waiver functions as an exculpatory clause, it is not prohibited as against public policy because it is clear and unambiguous and there is no surprise advantage.

In *Woods*, the Court concluded that because the waiver served to immunize the loan company from liability, the exculpatory language could not be enforced against the borrower. 280 S.W.3d at 99. Similarly here, the language of Missouri Title Loans'

class arbitration waiver serves to effectively immunize it from liability, and therefore, pursuant to the holding in *Woods*, such exculpatory language should not be enforced. Point three is denied.

E. The Loan Agreement Improperly Prohibits Class Arbitration

In its fourth and final point on appeal, Missouri Title Loans argues the trial court erred in finding the class arbitration waiver unconscionable and unenforceable because it does not attempt to prohibit arbitrations when in fact the loan agreement requires arbitration.

The argument in Missouri Title Loans's brief with respect to Point IV consists of three sentences with no citation to any authority. Essentially, Missouri Title Loans appears to claim the *class* arbitration waiver did not prohibit arbitration because it required arbitration. However, this argument ignores the fact that class arbitrations are prohibited by the language in Missouri Title Loans' agreement. As discussed in the analysis of Point I on appeal, there was sufficient evidence to support the conclusion that the provision in the loan agreement prohibiting class arbitrations was unconscionable. Therefore, Missouri Title Loans' argument fails. Point four is denied.

III. CONCLUSION

The judgment is affirmed.

MARY K. HOFF, J. and LAWRENCE E. MOONEY, J., concur.

APPENDIX C

IN THE STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT
ST. LOUIS CITY

Cause No.: 0722-CC-0015
Division 2

BEVERLY BREWER, on behalf of herself and of all those similarly situated,
Plaintiff,

vs.

MISSOURI TITLE LOANS, INC.,
Defendant.

JUDGMENT

Before this Court is *Defendant's Motion to Dismiss or Stay and Compel Arbitration*. The issue to be decided is whether the arbitration clause of Missouri Title Loans, Inc. is unconscionable and therefore unenforceable. Plaintiff argues that the clause is unconscionable because it constitutes an attempt by Defendant to prohibit its customers from pursuing class action or class arbitration claims of the type Plaintiff has alleged in her Petition. Defendant denies that its clause is unconscionable.

Based on the evidence presented by the parties, and based on their legal arguments, this Court holds that the arbitration clause of Missouri Title Loans, Inc. is unconscionable and therefore unenforceable as written. The Court holds that Defendant's arbitra-

tion clause improperly immunizes Defendant from the claims of its customers. The Court further rules that the portion of Defendant's arbitration clause prohibiting class arbitrations must be stricken by this Court.

The Court arrives at this conclusion because Defendant's arbitration clause prohibits all class actions and class arbitrations in situations A) where the class members would have no reasonable way to know that they were victims of the alleged violations by Defendant; and B) where Plaintiff and class members would be highly unlikely to find or hire attorneys to represent their interests regarding these types of claims, were they forced to pursue such claims individually. Consequently, Defendant's class action/arbitration ban improperly functions to immunize and exculpate Defendant. The Court further holds that the high costs of maintaining a class arbitration action would serve as an unreasonable bar for customers who might consider bringing a class arbitration claim against Defendant. Therefore, this Court holds that the cost allocation provisions of Defendant's arbitration clause must also be modified in order for that arbitration clause to be enforceable.

On September 5, 2008, Plaintiff and Defendant presented evidence to this Court at a hearing on the record. At the conclusion of the hearing, the Court granted the parties leave to file post-hearing briefs.

Plaintiff's allegations of Defendant's wrongful conduct, as outlined in the First Amended Petition, are taken as true when considering a Motion to Dismiss. In her Petition, Plaintiff alleged that Missouri Title Loans violated Missouri Merchandising Practices Act ("MPA") and Missouri statutes governing title lenders. This Court has weighed the

evidence presented at the hearing in coming to its conclusions. In its analysis, this Court has considered only the arbitration clause of Defendant's contract, and not considered the contract as a whole. The Court has focused on the evidence pertaining to the real world effect of Defendant's attempt to completely ban all class actions and class arbitrations by its customers.

Plaintiff cites numerous cases from Missouri and nationwide in which courts have struck down arbitration provisions as unconscionable in cases involving consumers, predictably small damages, and allegations of mass wrongdoing by companies. *See e.g. Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005), *Doerhoff, Sprague v. Household Int'l*, 473 F.Supp.2d 966 (W.D. Mo. 2005), *Muhammad v. Country Bank of Rehoboth Beach, Del.*, 189 N.J. 1 (N.J. 2006), *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1 (Ill. 2006), *Scott v. Cingular Wireless*, 161 P.3 d 1000 (Wa. 2007), *Vasquez-Lopez v. Beneficial Or.*, 152 P.3d 940 (Or. App. Ct. 2007), *Cooper v. QC Fin. Servs.*, 503 F.Supp.2d 1266 (D. Ariz. 2007), *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008) and *Fiser v. Dell*, 188 P.3d 1215 (N.M. 2008). This Court agrees with the reasoning of these cases.

In closing argument, counsel for Defendant argued to this Court that *Whitney v. Alltel* was not a final decision and that it was still on appeal. This is incorrect. The *Whitney* decision became final in 2005 and it provides substantial support for Plaintiff's positions.

Plaintiff argues that procedural unconscionability exists in this case because the arbitration provision was non-negotiable and was in fine print. Plaintiff

presented testimony from several witnesses that the language used in Defendant's arbitration provision would be difficult for the average consumer to understand. She also contends that there was a disparity in bargaining power between Plaintiff and Defendant. Plaintiff rightly points out that courts have presumed a disparity in bargaining power when the transaction involves a company such as Defendant and an individual. *See Cooper v. QC Fin. Servs.*, 503 F.Supp.2d 1266, 1286 (D. Ariz. 2007).

Plaintiff argues that Defendant's arbitration provision is substantively unconscionable for several reasons. First, she is being denied her right to a class action under the MPA. Second, class actions are necessary to provide notice and adequate legal representation to potential plaintiffs. Plaintiff presented expert testimony that absent notice, the type of violations in this case would not be apparent to the average consumer. Moreover, attorneys familiar with consumer law have provided testimony that handling these kinds of cases on an individual basis was nearly impossible because of the high cost and low recovery potential. Third, the fundamental purposes of arbitration are not being promoted in this case. Specifically, Plaintiff argues that individual arbitration is not efficient in this situation. Fourth, the practical effect of the provision is entirely one-sided with Plaintiff giving up a host of rights while Defendant gives up nothing.

Plaintiff presented testimony from Defendant's Corporate Representative, where he listed a multitude of rights that its customers were giving up. Although Defendant contended it was giving up the right to go to court just like its customers, Defendant's Corporate Representative admitted that

Defendant had never actually filed a class action against its customers and that, under its arbitration clause, Defendant could file suits in court to repossess the customer vehicles that secured its loans. Plaintiff further argues that the effects of Defendant's provision, when taken as a whole, effectively immunize Defendant from all liability.

Based upon the testimony, including the expert testimony, offered during the hearing and the legal arguments raised in the post-hearing briefs, this Court finds that there is ample evidence of both procedural and substantive unconscionability regarding Defendant's arbitration provision. This Court believes that if Defendant's arbitration provision were enforced, Defendant would be effectively immunized from any liability. Therefore, the arbitration provision is unenforceable, and this Court is left with broad discretion in further proceedings; it may refuse to enforce contract, it may enforce remainder of contract, free from provisions deemed to be unconscionable, or may limit application of offending clause in order to avoid unconscionable result. *See Bracey v. Monsanto Co.*, 823 S.W.2d 946, 950 (Mo. en banc 1992).

Defendant has argued that its arbitration provision should be enforced pursuant to the Federal Arbitration Act ("FAA"), in that the transactions under consideration involved "commerce" as defined under the FAA. Defendant further points out that the loan agreement signed by both parties states that the parties agreed to arbitrate any and all claims related to the agreement, except those related to Defendant's right to repossess the loan collateral. Even under the FAA, however, arbitration clauses are enforceable "save upon such grounds as exist at law or in equity

for the revocation of any contract." 9 U.S.C.A. §2. The United States Supreme Court explained this language in *Perry v. Thomas*, stating that "[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." 482 U.S. 483, 492, (1987). Plaintiff's arguments based on unconscionability constitute a proper challenge to Defendant's clause on the basis of laws governing the enforceability of contracts generally. Such challenges to an arbitration clause are to be resolved by this court rather than by an arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 440, 445-446 (2006).

Defendant has also argued that the class action sought by Plaintiff is an ineffective mechanism in resolving disputes. The Court disagrees. It is the public policy of Missouri that class actions shall be available as a procedural device. *See* Rule 52.08. Further, Missouri consumer laws (e.g., §407.025 RSMo) vest consumers with the right to brings their claims as a class.[1]

At the hearing, and through a motion filed at the hearing, Defendant now seeks to strike one sentence from its arbitration clause regarding the party responsible for bearing arbitration costs. The sentence Defendant seeks to strike is the following: "The parties agree to be responsible for their own expenses, including fees for attorneys, experts and witnesses." In arguing for this attempting this

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[1] This Court notes that although there is debate throughout the country as to whether there is a "right" to a class action, in Missouri, in addition to Missouri Revised Statute 52.08, the legislature saw fit to graft the class mechanism into the MPA, vesting consumers with a statutory right to class actions.

eleventh hour change to its arbitration clause, Defendant's counsel specifically admitted to this Court that this provision "puts a very high burden on somebody who might not have sufficient funds to pay a lawyer and these other expenses." The Court agrees with the Parties that this provision does put a high burden on customers who might consider arbitrating their claims against Defendant. The Court must interpret the language of Defendant's arbitration clause as it existed at the time of the transactions relevant to this class action, however, not as Defendant would now prefer that language to read. The Missouri Supreme Court requires this interpretation. *See State ex. rel. Schneider v. Vincent*, 194 S.W.3d 853 (Mo. en bane 2006), where the Missouri Supreme Court ruled that "the arbitration clause is viewed at the time it was made." *Id.*, at 860.

To the extent that it attempts to prohibit class actions and arbitrations, Defendant's arbitration clause is unconscionable under Missouri law. Defendant's arbitration clause is also unenforceable for an entirely separate ground: it functions as an exculpatory provision. Missouri case law consistently indicates that exculpatory clauses must be clearly worded and unambiguous if they are to be enforced. As the Missouri Supreme Court explained, "There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving." *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 337-338 (Mo. 1996).

Because the arbitration clause at issue contains a severability clause, it is appropriate to strike the offending portions and retain the remainder of Defendant's arbitration clause.

This Court's decision does not reflect hostility for arbitration as a whole but, rather, is the result of the application of general contract laws to the arbitration clause at issue. Defendant's *Motion to Compel Arbitration and to Dismiss Plaintiff's Petition* is partially granted so that this matter can proceed to arbitration to determine whether Plaintiff satisfies the requisite criteria for this matter to proceed as a class arbitration. Plaintiffs claim is to be sent to the American Arbitration Association without any prohibition against class arbitrations. A panel of arbitrators will determine whether a class should be certified and damages awarded, pursuant to Missouri law.

Defendant must pay all filing fees and arbitration costs, excluding expert testimony, attorneys fees and other fees incurred by plaintiff in preparation of her case not charged by the arbitration forum, that exceed the filing fee paid in this Court to file this case.

The Court finds that there is no just reason for delay and therefore denominates this Order a Judgment so that it may be appealed.

Costs in this court are taxed against Defendant.

So Ordered,

_____

David L. Dowd
Circuit Judge

December 19, 2008
cc: Attorneys of Record

APPENDIX D

IN THE STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT
ST. LOUIS CITY

Cause No. 0722-CC-00515
Division 2

BEVERLY BREWER, on behalf of herself and of all those similarly situated,
Plaintiff,

vs.

MISSOURI TITLE LOANS, INC.,
Defendant.

ORDER AND JUDGMENT

Before this Court is *Defendant's Motion to Dismiss or Stay and Compel Arbitration*. The issue to be decided is whether the arbitration clause of Missouri Title Loans, Inc. is unconscionable and therefore unenforceable. Plaintiff argues that the clause is unconscionable because it constitutes an attempt by Defendant to prohibit its customers from pursuing class action or class arbitration claims of the type Plaintiff has alleged in her Petition. Defendant denies that its clause is unconscionable.

Based on the evidence presented by the parties, and based on their legal arguments, this Court holds that the arbitration clause of Missouri Title Loans, Inc. is unconscionable and therefore unenforceable as written. The Court holds that Defendant's arbitra-

tion clause improperly immunizes Defendant from the claims of its customers. The Court further rules that the portion of Defendant's arbitration clause prohibiting class arbitrations must be stricken by this Court.

The Court arrives at this conclusion because Defendant's arbitration clause prohibits all class actions and class arbitrations in situations A) where the class members would have no reasonable way to know that they were victims of the alleged violations by Defendant; and B) where Plaintiff and class members would be highly unlikely to find or hire attorneys to represent their interests regarding these types of claims, were they forced to pursue such claims individually. Consequently, Defendant's class action/arbitration ban improperly functions to immunize and exculpate Defendant. The Court further holds that the high costs of maintaining a class arbitration action would serve as an unreasonable bar for customers who might consider bringing a class arbitration claim against Defendant. Therefore, this Court holds that the cost allocation provisions of Defendant's arbitration clause must also be modified in order for that arbitration clause to be enforceable.

On September 5, 2008, Plaintiff and Defendant presented evidence to this Court at a hearing on the record. At the conclusion of the hearing, the Court granted the parties leave to file post-hearing briefs.

Plaintiff's allegations of Defendant's wrongful conduct, as outlined in the First Amended Petition, are taken as true when considering a Motion to Dismiss. In her Petition, Plaintiff alleged that Missouri Title Loans violated Missouri Merchandising Practices Act ("MPA") and Missouri statutes governing title lenders. This Court has weighed the

evidence presented at the hearing in coming to its conclusions. In its analysis, this Court has considered only the arbitration clause of Defendant's contract, and not considered the contract as a whole. The Court has focused on the evidence pertaining to the real world effect of Defendant's attempt to completely ban all class actions and class arbitrations by its customers.

Plaintiff cites numerous cases from Missouri and nationwide in which courts have struck down arbitration provisions as unconscionable in cases involving consumers, predictably small damages, and allegations of mass wrongdoing by companies. *See e.g. Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005), *Doerhoff, Sprague v. Household Int'l*, 473 F.Supp.2d 966 (W.D. Mo. 2005), *Muhammad v. Country Bank of Rehoboth Beach, Del.*, 189 N.J. 1 (N.J. 2006), *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1 (Ill. 2006), *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wa. 2007), *Vasquez-Lopez v. Beneficial Or.*, 152 P.3d 940 (Or. App. Ct. 2007), *Cooper v. QC Fin. Servs.*, 503 F.Supp.2d 1266 (D. Ariz. 2007), *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008) and *Fiser v. Dell*, 188 P.3d 1215 (N.M. 2008). This Court agrees with the reasoning of these cases.

In closing argument, counsel for Defendant argued to this Court that *Whitney v. Alltel* was not a final decision and that it was still on appeal. This is incorrect. The *Whitney* decision became final in 2005 and it provides substantial support for Plaintiff's positions.

Plaintiff argues that procedural unconscionability exists in this case because the arbitration provision was non-negotiable and was in fine print. Plaintiff

presented testimony from several witnesses that the language used in Defendant's arbitration provision would be difficult for the average consumer to understand. She also contends that there was a disparity in bargaining power between Plaintiff and Defendant: Plaintiff rightly points out that courts have presumed a disparity in bargaining power when the transaction involves a company such as Defendant and an individual. *See Cooper v. QC Fin. Servs.*, 503 F.Supp.2d 1266, 1286 (D. Ariz. 2007).

Plaintiff argues that Defendant's arbitration provision is substantively unconscionable for several reasons. First, she is being denied her right to a class action under the MPA. Second, class actions are necessary to provide notice and adequate legal representation to potential plaintiffs. Plaintiff presented expert testimony that absent notice, the type of violations in this case would not be apparent to the average consumer. Moreover, attorneys familiar with consumer law have provided testimony that handling these kinds of cases on an individual basis was nearly impossible because of the high cost and low recovery potential. Third, the fundamental purposes of arbitration are not being promoted in this case. Specifically, Plaintiff argues that individual arbitration is not efficient in this situation. Fourth, the practical effect of the provision is entirely one-sided with Plaintiff giving up a host of rights while Defendant gives up nothing.

Plaintiff presented testimony from Defendant's Corporate Representative, where he listed a multitude of rights that its customers were giving up. Although Defendant contended it was giving up the right to go to court just like its customers, Defendant's Corporate Representative admitted that

Defendant had never actually filed a class action against its customers and that, under its arbitration clause, Defendant could file suits in court to repossess the customer vehicles that secured its loans. Plaintiff further argues that the effects of Defendant's provision, when taken as a whole, effectively immunize Defendant from all liability.

Based upon the testimony, including the expert testimony, offered during the hearing and the legal arguments raised in the post-hearing briefs, this Court finds that there is ample evidence of both procedural and substantive unconscionability regarding Defendant's arbitration provision. This Court believes that if Defendant's arbitration provision were enforced, Defendant would be effectively immunized from any liability. Therefore, the arbitration provision is unenforceable, and this Court is left with broad discretion in further proceedings; it may refuse to enforce contract, it may enforce remainder of contract, free from provisions deemed to be unconscionable, or may limit application of offending clause in order to avoid unconscionable result. *See Bracey v. Monsanto Co.*, 823 S.W.2d 946, 950 (Mo. en banc 1992).

Defendant has argued that its arbitration provision should be enforced pursuant to the Federal Arbitration Act ("FAA"), in that the transactions under consideration involved "commerce" as defined under the FAA. Defendant further points out that the loan agreement signed by both parties states that the parties agreed to arbitrate any and all claims related to the agreement, except those related to Defendant's right to repossess the loan collateral. Even under the FAA, however, arbitration clauses are enforceable "save upon such grounds as exist at law or in equity

for the revocation of any contract." 9 U.S.C.A. §2. The United States Supreme Court explained this language in *Perry v. Thomas*, stating that "[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." 482 U.S. 483, 492, (1987). Plaintiff's arguments based on unconscionability constitute a proper challenge to Defendant's clause on the basis of laws governing the enforceability of contracts generally. Such challenges to an arbitration clause are to be resolved by this court rather than by an arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 440, 445-446 (2006).

Defendant has also argued that the class action sought by Plaintiff is an ineffective mechanism in resolving disputes. The Court disagrees. It is the public policy of Missouri that class actions shall be available as a procedural device. *See* Rule 52.08. Further, Missouri consumer laws (*e.g.*, §407.025 RSMo) vest consumers with the right to brings their claims as a class.[1]

At the hearing, and through a motion filed at the hearing, Defendant now seeks to strike one sentence from its arbitration clause regarding the party responsible for bearing arbitration costs. The sentence Defendant seeks to strike is the following: "The parties agree to be responsible for their own expenses, including fees for attorneys, experts and witnesses." In arguing for this attempting this

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[1] This Court notes that although there is debate throughout the country as to whether there is a "right" to a class action, in Missouri, in addition to Missouri Revised Statute 52.08, the legislature saw fit to graft the class mechanism into the MPA, vesting consumers with a statutory right to class actions.

eleventh hour change to its arbitration clause, Defendant's counsel specifically admitted to this Court that this provision "puts a very high burden on somebody who might not have sufficient funds to pay a lawyer and these other expenses." The Court agrees with the Parties that this provision does put a high burden on customers who might consider arbitrating their claims against Defendant. The Court must interpret the language of Defendant's arbitration clause as it existed at the time of the transactions relevant to this class action, however, not as Defendant would now prefer that language to read. The Missouri Supreme Court requires this interpretation. *See State ex. rel. Schneider v. Vincent*, 194 S.W.3d 853 (Mo. en banc 2006), where the Missouri Supreme Court ruled that "the arbitration clause is viewed at the time it was made." *Id.* at 860.

To the extent that it attempts to prohibit class actions and arbitrations, Defendant's arbitration clause is unconscionable under Missouri law. Defendant's arbitration clause is also unenforceable for an entirely separate ground: it functions as an exculpatory provision. Missouri case law consistently indicates that exculpatory clauses must be clearly worded and unambiguous if they are to be enforced. As the Missouri Supreme Court explained, "There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving." *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 337-338 (Mo. 1996).

Because the arbitration clause at issue contains a severability clause, it is appropriate to strike the offending portions and retain the remainder of Defendant's arbitration clause.

This Court's decision does not reflect hostility for arbitration as a whole but, rather, is the result of the application of general contract laws to the arbitration clause at issue.

Defendant's Motion to Compel Arbitration and to Dismiss Plaintiff's Petition is partially granted so that this matter can proceed to arbitration to determine whether Plaintiff satisfies the requisite criteria for this matter to proceed as a class arbitration. Plaintiff's claim is to be sent to the American Arbitration Association without any prohibition against class arbitrations. A panel of arbitrators will determine whether a class should be certified and damages awarded, pursuant to Missouri law.

Costs taxed against Defendant.

So Ordered,

_____

David L. Dowd
Circuit Judge

cc: Attorneys of Record

APPENDIX E

SUPREME COURT OF MISSOURI
en banc
November 16, 2010

MOTIONS FOR REHEARING

SC90647 Beverly Brewer, Respondent, vs. Missouri Title Loans, Inc., Appellant.

Appellant's motion for stay of mandate to remand or, alternatively, for rehearing overruled.

SC90701 State ex rel. Gina Marie Houska, Personal Representative of the Estate of Jeffrey A. Houska, Deceased, Relator, vs. The Honorable Ray Dickhaner, Respondent.

Respondent's motion for rehearing overruled.

APPLICATIONS FOR TRANSFER AND RECOMMENDATIONS FOR TRANSFER

SC91087 Bernardo O. Costa, Appellant, vs. Arthur E. Allen, Respondent.

Appellant's application for transfer from the Missouri Court of Appeals, No. WD71055, denied.

SC91174 Melody Spencer, Appellant, vs. Karl Zobrist, et al., Respondents.

Appellant's application for transfer from the Missouri Court of Appeals, No. WD71364, denied.

SC91175 Kevin Schnell, Appellant, vs. Karl Zobrist, et al., Respondent.

Appellant's application for transfer from the Missouri Court of Appeals, No. WD71365, denied.

SC91208 Brian Daniel Russell, Appellant, vs. Healthmont of Missouri, LLC, d/b/a Callaway Community Hospital, Respondent.

Appellant's application for transfer, prior to disposition, from the Missouri Court of Appeals, No. WD72861, denied.

SC91211 David Hinchman, Respondent, vs. Sarah Xianghong Hinchman, Appellant.

Appellant's application for transfer from the Missouri Court of Appeals, No. WD71143, denied.

SC91213 Robert Allen Lamberson, Appellant, vs. State of Missouri, Respondent.

Appellant's application for transfer from the Missouri Court of Appeals, No. WD71806, denied.

SC91215 Saddleridge Estates, Inc., and McClain Brothers Real Estate, L.L.C., Respondents-Appellants, vs. Eugene Ruiz and Charlene Ruiz, Appellants-Respondents.

Appellants-Respondents' application for transfer from the Missouri Court of Appeals, Nos. WD70806 and WD71311, denied.

SC91216 Richard Robinson, et al., Appellants, vs. Cheryl Hooker, Respondent.

Respondent's application for transfer from the Missouri Court of Appeals, No. WD71207, denied.

SC91218 Kathleen Marie Martz, Appellant, vs. Robert Dingel Martz, Respondent.

Appellant's application for transfer from the Missouri Court of Appeals, No. SD29838, denied.

SC91219 Catherine Ann Stone, Respondent, vs. Missouri Department of Health and Senior Services, Appellant.

Appellant's application for transfer from the Missouri Court of Appeals, No. WD71813, sustained and cause ordered transferred.

SC91220 Thomas D. Goodner, Appellant, vs. Missouri Department of Conservation, et al., Respondents.

Appellant's application for transfer from the Missouri Court of Appeals, No. WD71556, denied.

SC91224 In the Interest of: K.E.S., Greene County Juvenile Office, Respondent, vs. K.R.S., Appellant.

Appellant's application for transfer from the Missouri Court of Appeals, No. SD30297, denied.

SC91225 Janie L. Gromer, Respondent, vs. Hubert Matchett, Sr., Appellant.

Appellant's application for transfer from the Missouri Court of Appeals, No. SD29942, sustained and cause ordered transferred.

SC91234 State of Missouri, Respondent, vs. Ben C. Sitton, Jr., Appellant.

Appellant's application for transfer from the Missouri Court of Appeals, No. SD30237, denied.

SC91238 Commercial Realty Associates Limited Partnership, Appellant, vs. Citizens National Bank, et al., Respondents.

Appellant's application for transfer from the Missouri Court of Appeals, No. ED93408, denied.

SC91240 Alice Vaughn, Respondent, vs. Missouri Department of Social Services, Family Support Division, Appellant.

Appellant's application for transfer from the Missouri Court of Appeals, No. ED94196, denied.

SC91241 Antwon Nelson, Appellant, vs. State of Missouri, Respondent.

Appellant's application for transfer from the Missouri Court of Appeals, No. ED94225, denied.

SC91242 State of Missouri, Respondent, vs. Everett Jones, Appellant.

Appellant's application for transfer from the Missouri Court of Appeals, No. ED93095, denied.

SC91243 In re: The Estate of Harry Henderson Qualls, Deceased.

Appellants' application for transfer from the Missouri Court of Appeals, No. ED93619, denied.

SC91244 State of Missouri, Respondent, vs. Don Rader, Appellant.

Appellant's application for transfer from the Missouri Court of Appeals, No. SD29935, denied.

SC91247 David Peters, Appellant, vs. Gilbert L. Peters, Jr., Individually, and Janet M. Trent, Respondents.

Appellant's application for transfer from the Missouri Court of Appeals, No. ED94219, denied.

Respondents' application for transfer from the Missouri Court of Appeals, No. ED94219, denied.

SC91257 Hugh Bryan, Appellant, vs. Joseph Peppers, Defendant, and State Farm Mutual Automobile Insurance Company, Respondent.

Appellant's application for transfer from the Missouri Court of Appeals, No. SD30068, denied.

SC91258 Randall Craig Swofford, Appellant, vs. State of Missouri, Respondent.

Appellant's application for transfer from the Missouri Court of Appeals, No. ED93661, denied.

SC91259 City of Dardenne Prairie, Respondent, vs. Cora Bopp Limited Partnership, et al., Appellants.

Appellant City of O'Fallon's application for transfer from the Missouri Court of Appeals, No. ED93590, denied.

WRITS AND OTHER ORIGINAL PROCEEDINGS

SC91217 State ex rel. Robert E. Wilkin, Petitioner, vs. Larry Denney, Warden, Respondent.

Petition for writ of habeas corpus denied.

SC91223 State ex rel. James R. Davis, II, Petitioner, vs. Doug Prudden, Respondent.

Petition for writ of habeas corpus denied.

SC91229 State ex rel. Maurice Williams, Petitioner, vs. The Honorable Michael Francis Stelzer, Respondent.

Petition for writ of habeas corpus denied.

SC91233 State ex rel. Darrin McBride, Petitioner, vs. Jeremiah W. Nixon, Chris Koster, and Missouri Department of Corrections, et al., Respondents.

Petition for writ of habeas corpus denied.

Petitioner's motion for appointment of counsel overruled as moot.

SC91250 State ex rel. Judith A. Decker-Wegener, Petitioner, vs. Michael H. Wegener and Cynthia Fox, Respondents.

Petition for writ of mandamus denied.

SC91262 State ex rel. Wabash General Hospital District, Relator, vs. The Honorable Mark H. Neill, Respondent.

Petition for writ of prohibition and/or mandamus denied.

MOTIONS

SC90853 State of Missouri, Respondent, vs. Anthony Brown, Appellant.

Appellant's motion for this Court to direct the trial court to submit appeal overruled.

SC61431 State of Missouri, Respondent, vs. Jerome Downs, Appellant.

Appellant's motion to recall the mandate, vacate judgment and redocket the cause for rehearing on appeal overruled.

SC81165 State of Missouri, Respondent, vs. John E. Winfield, Appellant.

Appellant's motion to recall the mandate and, alternatively, for petition for writ of habeas corpus overruled.

SC91210 State of Missouri, Plaintiff, vs. Rodney Earl Cutts, Defendant.

Defendant's motion for leave to file notice of appeal out of time overruled.

SC91256 Donald W. Preston, Appellant, vs. State of Missouri, Respondent.

Respondent's motion to file application for transfer five days out of time overruled.

Day - to - Day,

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Mary R. Russell
Acting Chief Justice

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. VI, cl. 2:

> All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

9 U.S.C. § 2:

> Sec. 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any

part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

APPENDIX G

STATE OF MISSOURI
CIRCUIT COURT OF ST. LOUIS CITY
TWENTY-SECOND JUDICIAL CIRCUIT

ALTHEA PEETE Individually and
on Behalf of All Others Similarly Situated
Plaintiff,

v.

MISSOURI TITLE LOANS, INC.,
Defendant.

Serve: Martin M. Green, Esq.
Green, Schaaf & Jacobson
7733 Forsyth, Suite 700
Clayton, MO 63105

CLASS ACTION PETITION

Plaintiff Althea Peete (hereinafter "Plaintiff"), individually and on behalf of similarly situated individuals described in this Petition, by and through her attorneys, brings this action against defendant Missouri Title Loans, Inc. ("Missouri Title Loans" or "Defendant"), as a result of Defendant's violations of the Missouri Merchandising Practices Act (Mo.Rev.Stat. 407.010) and the laws governing title lenders (Mo.Rev.Stat. 367.500 *et seq.*).

Overview[1]

Ms. Peete took out a title loan to pay her bills. She is a mother of two adult children and she currently has custody of her teen age grandson. On May 18, 2006 Defendant allowed Ms. Peete to finance $608.50, at 360% interest.[2] This amount included the principal she borrowed plus separate mandatory fees (Ms. Peete ended up with only $500 cash as she left Defendant's office). At the time she took out the loan, she collected disability of only $724.09 per month. According to the terms of Defendant's loan contract, she was required to pay back the full amount of principal plus $186.05 of interest only one month later, a total of $794.55.[3] This amount was more than her total monthly income.

Those who engage in title lending typically offer to lend money for short periods of time at high rates of interest. Because the interest rate on title loans often exceeds 300%, title loans can become a bottomless pit of debt for borrowers. In addition to high interest rates, title lenders obtain a security interest by requiring the borrowers to hand over the original title and a set of keys of the borrower's car.

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[1] Additional background material providing context for the allegations of this case is provided in the form of four separate Attachments B) Historical Background on Title Loans; C) Arbitration Clause Enforceability; D) Copy of Defendant's Arbitration Clause; and E) Affidavit of Matt Clements, Esq.

[2] Ms. Peete took out her loan at Defendant's office located at 1937 Shenandoah, St. Louis, MO, 63104.

[3] The contract number is TL-MO0214060518-0365-00.

The Missouri legislature has passed several laws which attempt to protect the customers of title lenders from this cycle of debt.[4]

- §367.518.1.1 RSMo requires that the monthly interest rate charged be disclosed on the loan agreement.
- §367.518.1.5 RSMo requires a statement providing the borrower the right to cancel the loan without any costs by the close of the next business day.
- §367.512.4 RSMo requires that upon the third renewal of the loan and all subsequent renewals, the principal be reduced by 10% until the loan is paid in full.
- §367.518.1.6 RSMo requires the disclosure of the hours and location where the titled personal property may be delivered.
- §367.525.1 RSMo requires title lenders to provide detailed statutory disclosures to borrowers.
- §367.525.4 RSMo requires title lenders to consider the financial ability of the borrower to reasonably repay the loan in the time and manner specified before making the loan.
- §367.527.1.3 RSMo prohibits a title lender from requiring a waiver of any right or protection of a borrower.
- §367.527.1.7 RSMo provides that a title lender shall not knowingly violate any sections under the Title Loan Section.

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[4] All statutes referenced in this section are fully set out in the Referenced Statutes and Interpretations Section.

- §367.527.2 and §367.506.2 RSMo provides that if a title lender enters into a transaction in violation of the above statutes, then the lien and loan are void and that the borrower's only liability is for the principal.

It should be noted that Missouri law allows extremely high interest rates (as much as 400% or even more) and authorize lenders to hold the physical title of borrowers' vehicles. Thus, title lenders who abide by these Missouri laws can still earn substantial amounts of income on these secured loans.

In this case involving Ms. Peete, Defendant has disregarded each of the Missouri statutes set forth above in the following ways:

- Defendant failed to disclose the monthly interest rate on the loan agreement.
- Defendant failed to provide separate acknowledgement and disclosure of the required statement: "You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender's next full business day."
- Defendant failed to disclose the location where titled personal property may be delivered if the loan was not paid and the hours of operation of such locations receiving such deliveries.
- Defendant failed to provide disclosure of the required statement:

  NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your

automobile. (2). This lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lose my automobile. _____ Borrower _____ Date

- Defendant failed to assess Plaintiff's ability to repay their loan.
- Defendant failed to reduce the principal of the loan by 10% upon the third and subsequent renewals.
- Defendant has written provisions in their contract which waive rights and protections of the borrower.
- Defendant violated other Missouri title statutes as well as the Missouri Merchandising Practices Act and, in the process, harmed Plaintiff and the class of Plaintiff they represent.

Referenced Statutes and Interpretations

§367.506.2 RSMo

All title loan agreements entered into by a person who acts in violation of the licensing requirements of sections 367.500 to 367.533, and all title pledges accepted by such person, shall be null and void. Any borrower who enters into a title loan agreement with a person who acts in violation of the provisions of sections 367.500 to 367.533 shall not be bound by such agreement, and such borrower's only liability shall be for the return of the principal.

§367.518.1.4 RSMo
Each title loan agreement shall disclose the monthly interest rate to be charged.

§367.518.1.5 RSMo
Each title loan agreement shall disclose the statement which shall be in at least ten-point bold type, separately acknowledged by the signature of the borrower and reading as follows: You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender's next full business day.

§367.512.4 RSMo
The title lender shall renew the title loan agreement upon the borrower's written request and the payment by the borrower of any interest due at the time of such renewal. However, upon the third renewal of any title loan agreement, and any subsequent renewal, the borrower shall reduce the principal by ten percent until such loan is paid in full.

§367.518.1.6 RSMo
Each title loan agreement shall disclose the location where the titled personal property may be delivered if the loan is not paid and the hours of such locations is open for receiving such deliveries.

§367.525.1 RSMo
Before accepting a title loan agreement, the lender shall provide the borrower the following notice in at least ten-point bold type and receipt thereof shall be acknowledged by signature of the borrower.

> NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2). This

lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lost my automobile. _____ Borrower _____ Date

§367.525.4 RSMo
When making or negotiating loans, the title lender shall take into consideration in determining the size and duration of a loan contract the financial ability of the borrower to reasonably repay the loan in the time and manner specified in the loan contract.

§367.527.1.3 RSMo
A title lender shall not accept any waiver of any right or protection of a borrower.

§367.527.1.7 RSMo
A title lender shall not knowingly violate any provision of sections 367.500-367.533 or any rule promulgated thereunder.

§367.527.2 RSMo
If a title lender enters into a transaction contrary to this section, the loan and the lien shall be void.

Parties

1. Ms. Althea Peete is a Missouri citizen residing at 6111 Alabama Ave., St. Louis City, Missouri, 63111
2. Missouri Title Loans, Inc. is a Missouri corporation licensed to issue title loans.
3. Missouri Title Loans, Inc. has approximately 58 stores in Missouri.

Venue and Jurisdiction

4. The Circuit Court of St. Louis City has subject matter jurisdiction over this action because the actions complained of took place in St. Louis city. V.A.M.S. 407.025.1; V.A.M.S. 408.562.

5. The Circuit Court of St. Louis City has personal jurisdiction over the Defendant because it regularly conducts business in St. Louis City.

6. Venue is proper in the Circuit Court of St. Louis City because the cause of action arose in St. Louis City. V.A.M.S. 407.025.1; V.A.M.S. 408.562.

General Allegations

7. Upon information and belief, Plaintiff took out title loans at the Defendant's store located at 1937 Shenandoah Ave., St. Louis City, Missouri.

8. With regard to any these loans, Defendant:

   a. failed to consider the financial ability of Plaintiff to reasonably repay the loan in the time and manner specified in the loan contract;

   b. failed to include all necessary and required disclosures in the agreement signed by Plaintiff;

   c. failed to reduce the principal of the loan by 10% upon the third and subsequent renewals;

   d. failed to provide proper notice to Plaintiff;

   e. required the waiver of rights and protections of the borrower in direct contravention of the law;

f. collected interest, fees, and illegally possessed Plaintiff's Class Members' vehicles based on loans which under Missouri law are void.

Class Action Allegations

9. Plaintiff brings this action on behalf of herself and all others similarly situated pursuant to Missouri Revised Statute 407.025.3, Missouri Rule of Civil Procedure 52.08 and the other statutes and authorities referenced in this Petition. The claims asserted are brought on behalf of a statewide class of consumers.

10. The class and sub-classes are defined and described as follows:

All Missouri citizens who obtained any title loan from Defendant, where Defendant:

A) failed to disclose the monthly interest rate on the loan agreement; or

B) failed to provide a separate acknowledgement and disclosure of the required statement, namely, the following language:

> "You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender's next full business day."; or

C) failed to disclose the location where titled personal property may be delivered if the loan was not paid and the hours of operation of such locations receiving such deliveries; or

D) failed to provide borrowers with this required statement:

NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2). This lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lose my automobile. _____ Borrower _____ Date

E) failed to consider the financial ability of the borrower to reasonably repay the loan in the time and manner specified in the loan contract; or

F) failed to reduce the principal amount of the loan by at least 10% of the original amount of the loan upon the third and subsequent renewals; or

G) required the borrower to waive rights and protections.

Excluded from the proposed class are defendant and its officers, directors, and employees, as well as employees of any of defendant's subsidiaries, affiliates, successors or assignees. Also excluded are the immediate family members of the above persons. Also excluded is any trial judge who may preside over this case.

11. The requirements for maintaining this action as a class action are satisfied, as set forth immediately below:

a. The proposed class is so numerous and so geographically dispersed that the individual joinder of all absent class members is impracticable. While the exact number of absent class members is unknown to Plaintiff at this time, it is ascertainable by appropriate discovery and Plaintiff, upon information and belief, alleges that the proposed class may include thousands of members. The requirement of numerosity is therefore satisfied.

b. Common questions of law or fact exist as to all proposed class members and predominate over any questions which affect only individual members of the proposed class. These common questions of law or fact include:

   i. Whether Defendant failed to make statutorily required disclosures in the loan documents provided to Plaintiff and Class Members;

   ii. Whether Defendant failed to evaluate the ability of Plaintiff and Class Members to repay loans in the manner and time specified;

   iii. Whether Defendant failed to disclose specific notice requirements mandated by Missouri law;

   iv. Whether Defendant required Plaintiff and Class Members to waive their rights and protections in violation of Missouri law;

v. Whether Defendant violated Missouri consumer protection laws pertaining to title loans;

vi. Whether Defendant violated Missouri law by failing to reduce the principal on Plaintiff's and Class Members' loans by at least 10% upon the third and all subsequent renewals;

vii. Whether Plaintiff and Class Members are entitled to punitive damages.

12. The claims of the Plaintiff are typical of the claims of the class.

13. Plaintiff will fairly and adequately represent the interests of the members of the class. Plaintiff has no interest adverse to the interests of the members of the class. Plaintiff has retained competent attorneys who have experience in class action litigation.

14. A class action is a superior method for the fair and efficient adjudication of this controversy. The adjudication of a separate action by individual members of the class would create a risk of a) inconsistent or varying adjudications with respect to individual members of the class; or b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

15. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members. There

is no special interest in the members of the class individually controlling the prosecution of separate actions; the damages sustained by individual class members may be relatively small; and the expense and burden of individual litigation make it impossible for the class members individually to address the wrongs done to them.

16. There will be no difficulty managing this lawsuit as a class action in this Court. Furthermore, Defendant transacts substantial business in the State of Missouri and will therefore not be prejudiced or inconvenienced by the maintenance of the action in this forum.

COUNT I

Declaratory Relief - Arbitration Clause Unconscionable and Against Missouri Public Policy

17. Plaintiff re-alleges and incorporated by reference all other paragraphs of this Petition as if fully set forth herein.

18. There is a present controversy between Defendant and Plaintiff (and class members) because Defendant has placed an arbitration clause prohibiting class actions and class arbitrations in its loan contract. Plaintiff and class members contend it is unenforceable, against Missouri public policy and unconscionable under state law.

19. Pursuant to Missouri Revised Statute 527.010 (the "Missouri Declaratory Judgment Act") any circuit court shall have the power to "declare rights, status, and other legal relations . . . . The declaration may be either affirmative or negative in form and effect; and such declara-

tions shall have the force and effect of a final judgment of decree."

20. The purpose of the Missouri Declaratory Judgment Act is to give "relief from uncertainty and insecurity." *See Preferred Physicians Mut. Management Group, Inc. v. Preferred Physicians Mut. Risk Retention Group*, 916 S.W.2d 821, 823-24 (Mo. App. W.D. 1995). This court should consider public policy and interest, efficiency, convenience, economy and the good or bad faith of the party bringing the declaratory judgment action in reaching its decision.

21. Plaintiff's challenge that the arbitration clause is unconscionable and against public policy is directed against the arbitration clause only.

22. Plaintiff does not challenge the validity of the contract as a whole.

23. Because Plaintiff's challenge is to the validity of the arbitration clause only, it is an issue for the court to resolve *See* 9 USCA § 2 (allowing challenges to arbitration clauses an grounds existing at law); *see also Buckeye Check Cashing, Inc. v Cardegna*, 126 S.Ct. 1204, 1209 (2006)(holding that arbitration clauses are severable from the rest of the contract); and *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003) (holding that "generally applicable state law contract defenses, such as fraud, duress and unconscionability, may be used to invalidate arbitration agreements without contravening the FAA").

24. Defendant's arbitration clause is both procedurally and substantively unconscionable.

25. Procedural and substantive unconscionability are factual issues to be determined by this Court by weighing evidence. *See Whitney v Alltel*, 173 S.W.3d 304, 309 (Mo. App. W.D. 2005) (in which appellate court affirmed trial court's decision because trial court "weigh[ed] evidence of both procedural and substantive unconscionability'); *see also* Affidavit of Matt Clements, Esq., attached as Attachment D.

26. In the contracts of Plaintiff and class members, Defendant included an arbitration clause that purports to require binding arbitration and which purports to prohibit class actions and class arbitration. The arbitration clause is attached as Attachment C, Defendant's contract language includes the following language:

> By agreeing to arbitrate disputes, borrower waives any right borrower may otherwise have had to litigate claims through a court or to have a jury trial. Further, unless a claim is already certified before the date of this agreement, borrower hereby agrees borrower may not participate in a class action or a class-wide arbitration, either as a representative or member of any class or claimants pertaining to such claim and borrower hereby expressly waives borrower's right to join or represent such a class.

27. Defendant possesses bargaining strength and power that is far superior to that of Plaintiff and its other customers without discussion or negotiation. Defendant requires its customers to sign standardized form arbitration clauses, drafted by Defendant, which are mini-contracts of adhesion because they are offered on a take-it

or leave-it basis and the customer has the opportunity only to adhere to the arbitration clause.

28. Defendant's arbitration clause is substantially one-sided and unconscionable in favor of Defendant, and Defendant knows that the arbitration clause is substantially one-sided in its favor and unconscionable.

29. Defendant's arbitration clause purports to prohibit all class actions and all class arbitrations.

30. The arbitration clause purports to require Plaintiff and class members to pay attorneys fees and costs and expert witness fees in order to seek to recover nominal damages in individual actions.

31. Defendant's arbitration clause requires the Plaintiff to pay a $125 filing fee regardless of the valve of the claim but prohibits class arbitration or class actions.

32. Defendant's prohibition on class arbitration and class actions makes it impossible for most members of the class to learn of the defendant's violations.

33. Defendant's prohibitory on class arbitration and class actions makes it difficult or impossible for those who do learn of the violations to find competent claims to prosecution claims against Defendant.

34. Even if a consumer did learn of the violation and could find competent counsel, a reasonable consumer would be unlikely to pursue the claim because the cost of an individual arbitration, as

well as filing fees, attorneys fees, expert fees and the wages claimants would lose pursuing such a claim, would often exceed the potential recovery.

35. In the absence of an arbitration clause barring class treatment of this case, the costs mentioned in the allegation above could normally be distributed among a class; Defendant has prohibited class arbitrations and class actions in order to grant itself de facto immunity. The arbitration clause functions to give Defendant the right to freely violate Missouri law.

36. Arbitration is designed to produce efficient resolution of issues.

37. Defendant has intentionally sought to use arbitration to produce inefficiency by requiring thousands of identical claims to be resolved one-by-one, in individual arbitration.

38. Defendant's arbitration clause gives defendant free reign to violate Missouri laws (as set forth herein) without meaningful threat of civil suit by the victims and therefore without meaningful possibility of a remedy for the great majority of the victims.

39. The arbitration clause strips Plaintiff's and class members' right under Chapter 407 RSMo and the Missouri Rules of Civil Procedure 52.08 to pursue class actions against deceptive or unfair businesses, which is in violation of statute 367.527.3 RSMo prohibiting the waiver of any rights or protections.

40. When, as here, a class action ban is found in a consumer contract of adhesion in a setting in

which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money such waivers are unconscionable and should not be enforced. This is true because without the court's intervention "the company could continue its improper and deceptive charges ad infinitim since none of its customer's would have a practical remedy to bring about a stop to the conduct" *See Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 314 (Mo. App. W.D. 2005).

41. Enforcing a clause which would prohibit class arbitration and class actions in a situation in which doing so would make it unlikely that consumers would be able to vindicate their rights under Missouri law is against public policy. *Doerhoff v. General Growth Properties, Inc*, 2006 WL 3210502 at 6 (Mo. W.D. 2006).

42. "An average person would not reasonably expect that a dispute in which small damages have occurred to a large number of consumers would need to be resolved through arbitration on an individual case by case basis." *See Whitney v. Alltel Communications, Inc*, 173 S.W.3d 300, 314 (Mo. App. W.D. 2005). Defendant's clause is therefore unenforceable under Missouri law.

43. Pursuant to Missouri Revised Statute 527.010, a judicial determination is necessary and appropriate in order that the parties may ascertain their respective rights and duties with

regard to the arbitration language Defendant has included in its loan contracts.

44. Plaintiff and Class request discovery on the arbitration issue so that they may develop a factual record regarding procedural and substantive unconscionability.

45. Plaintiff and Class hereby request a declaratory judgment, adjudicating and declaring that Defendant's mandatory arbitration clause and waiver of class action rights is procedurally and substantively unconscionable, against Missouri public policy and unenforceable under Missouri law.

46. Plaintiff and Class request that the Court enter judgment in their favor and against Defendant Title as described in the *Prayer for Relief* in this *Petition*.

COUNT II
Missouri Merchandising Practices Act

47. Plaintiff re-alleges and incorporates by reference all other paragraphs of this *Petition* as if fully set forth herein.

48. This claim is brought pursuant to the Missouri Merchandising Practices Act, R.S.Mo. § 407.010 *et seq*.

49. Plaintiff and Class are entitled to bring this action pursuant to R.S.Mo. § 407.025.2.

50. Plaintiff and Class entered into consumer transactions with Defendant in which the Plaintiff would pay interest and fees as a condition for obtaining short term loans.

51. Lending is a service. Services are included in the definition of "merchandise" under Missouri Revised Statute 407.010.

52. Plaintiff's and Class' loans were obtained exclusively for their personal use.

53. During the course of these transactions, Defendant engaged in unfair or deceptive trade practices including the issuing of loans induced by unlawful trade practice, deception, fraud, false pretense, misrepresentation, concealment, suppression, omission of, and the knowing failure to state, material facts, including:

    a. Omitting disclosures on the loan agreement as mandated by Missouri law (§367.518.4, §367.518.5, §367.518.6 RSMo);

    b. Omitting the required notice provision from Plaintiff's and Class Members' loan agreement as required by Missouri law (§367.525.1 RSMo);

    c. Failing to tell Plaintiff and Class Members that frequent renewals of loans would result in interest and fees that far exceeded the actual value of the loan (§367.512.4 RSMo);

    d. Paying excess interest and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

    e. Representing to Plaintiff and Class that they were eligible for a title loan when in fact Defendant did not evaluate the Plaintiff and Class Members' ability to pay before loaning money (§367.525.4 R.S.Mo.); and

54. Defendant willfully and intentionally violated Missouri Revised Statute 447.010 *et seq.*

55. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan;

    b. paying excess interest and fees because the Defendant failed to reduce the principal by at least 10% upon the third an subsequent renewals;

    c. violation of statutorily required notice provision in the contract;

    d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 R.S.Mo.

56. Violating Missouri law in each of the ways set forth in the Class Definition set forth above.

57. Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT III
Per se Violation of the
Missouri Merchandising Practices Act.

58. Plaintiff re-alleges and incorporates by reference all other paragraphs of this *Petition*, as if fully set forth herein.

59. This claim is brought pursuant to the Missouri Merchandising Practices Act, R.S.Mo. § 407.010

et seq. for *per se* violations based upon Missouri Law.

60. Plaintiff and the Class are entitled to bring this action pursuant to §407.025.2.

61. Plaintiff and Class entered into consumer transactions with Defendant in which the Plaintiff would pay for the service of short term loans.

62. Lending is a service. Services are included in the definition of "merchandise" under Missouri Revised Statute 407.010.

63. The Plaintiff and Class' loans were obtained exclusively for their personal use.

64. During the course of these transactions, Defendant engaged in unfair or deceptive trade practices including the issuing of loans induced by unlawful trade practice, deception, fraud, false pretense, misrepresentation, concealment, suppression, omission of, and the knowing failure to state, material facts as defined by Missouri Law. These violations are *per se* violations of the Missouri Merchandising Practices Act:

a. Defendant omitted the required disclosures on the loan agreements in violation of Missouri Revised Statutes 367.518.1.4, 367.518.1.5, and 367.518.1.6;

b. Defendant omitted the required notice prior to obtaining the loan in violation of Missouri Revised Statute 367.525.1;

c. Defendant deceptively renewed the Plaintiff's and Class' loans without considering the financial ability of the borrowers to repay the loan in the time and manner speci-

fied in the loan contract in violation of Missouri Revised Statute 367.525.4.

d. Defendant deceptively failed to reduce the principal on the Plaintiff and Class' loans by at least 10% upon the third and all subsequent renewals in violation of Missouri Revised Statute 367.512.4;

e. Defendant fraudulently waived Plaintiff and Class' rights and protections in direct violation of Missouri Revised Statute 367.527.3.

65. Defendant willfully and intentionally violated Missouri Revised Statute 407.010 *et seq*.

66. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan;

b. paying excess interest and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

c. paying on a loan that could have been revoked within a day of obtaining it;

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

67. Violating Missouri law in each of the ways set forth in the Class Definition, set forth above.

68. Plaintiff and Class request that the Court enter judgment in their favor and against defendant

as described in the *Prayer for Relief* in this *Petition*.

COUNT IV
Violation of Mo.Rev.Stat. 367.518.1.4
(disclosure of monthly interest rate)

69. Plaintiff re-alleges and incorporates by reference all other paragraphs of this *Petition*, as if fully set forth herein.

70. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

71. Missouri Revised Statute 367.518.1.4 states that each loan agreement shall disclose the monthly interest rate to be charged.

72. The Missouri Division of Finance has promulgated a form that if used would comply with all required disclosures.

73. Defendant did not use such form.

74. Defendant violated Missouri Revised Statute 367.518.1.4 by failing to denote the monthly interest rate to be charged on the loan agreement provided to Plaintiff and Class.

75. Defendant willfully and intentionally violated Missouri Revised Statute 367.518.1.4.

76. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan.

b. paying on a loan that could have bean revoked within a day of obtaining it.

c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals.

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

77. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

78. Plaintiff and Class Members request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT V
Violation of Mo.Rev.Stat. 367.518.1.5
(disclosure of ability to cancel)

79. Plaintiff re-alleges and incorporated by reference all other paragraphs of this *Petition* as if fully set forth herein.

80. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

81. Missouri Revised Statute 367.518.1.5 requires the following disclosure to be disclosed on each loan agreement in at least ten-point font, bold type, separately acknowledged by the signature of the borrower and reading as follows:

"You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender's next full business day."

82. Defendant failed to include this disclosure anywhere in the loan agreement provided to Plaintiff and Class.

83. Defendant willfully and intentionally violated Missouri Revised Statute 367.518.1.5.

84. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan.

b. paying on a loan that could have bean revoked within a day of obtaining it.

c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals.

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2. RSMo.

85. Defendant has violated Missouri law in each of the ways set forth in the Class Definition set forth above.

86. Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT VI

Violation of Mo.Rev.Stat. 367.518.1.6
(disclosure delivery of personal property)

87. Plaintiff re-alleges and incorporated by reference all other paragraphs of this *Petition* as if fully set forth herein.

88. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

89. Missouri Revised Statute 367.518.1.6 requires that each loan agreement shall disclose the location where the titled personal property may be delivered if the loan is not paid and the hours such location is open for receiving such deliveries.

90. Defendant failed to disclose this information anywhere on the loan agreement provided to Plaintiff and Class.

91. Defendant willfully and intentionally violated Missouri Revised Statute 367.518.1.6.

92. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan.

b. paying on a loan that could have bean revoked within a day of obtaining it.

c. paying excess interests and fees because the Defendant failed to reduce the principal by

at least 10% upon the third and subsequent renewals.

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2. RSMo.

93. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

94. Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT VII
Violation of Mo.Rev.Stat. 367.512.4
(reduction of loan by 10%)

95. Plaintiff re-alleges and incorporated by reference all other paragraphs of this *Petition* as if fully set forth herein.

96. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

97. Missouri Revised Statute 367.512.4 requires upon the third renewal of any title loan agreement, and any subsequent renewal, the borrower shall reduce the principal by ten percent until such loan is paid in full.

98. Defendant failed to reduce the principal by 10% upon the third and subsequent renewals of the Plaintiff's and Class's loans.

99. Defendant willfully and intentionally violated Missouri Revised Statute 367.512.4.

100. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

a. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals.

b. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan.

c. paying on a loan that could have bean revoked within a day of obtaining it.

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2. RSMo.

101. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

102. Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT VIII
Violation of Mo.Rev.Stat. 367.525.1
(notice of loss of vehicle)

103. Plaintiff re-alleges and incorporated by reference all other paragraphs of this *Petition* as if fully set forth herein.

104. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to

title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

105. Missouri Revised Statute 367.525.1 requires Defendant to provide the borrower the following notice in at least ten-point bold type and receipt thereof shall be acknowledged by the signature of the borrower. This notice should be provided before the borrower accepting a title loan application and state . . . .

> NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2). This lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lost my automobile. _____ Borrower _____ Date

106. The Missouri Division of Finance has promulgated a form that if used, would comply with all necessary notice requirements.

107. Defendant did not use such form.

108. Upon information and belief, Defendant failed to provide this notice to Plaintiff and Class.

109. Defendant willfully and intentionally violated Missouri Revised Statute 367.525.1.

110. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan.

b. paying on a loan that could have bean revoked within a day of obtaining it.

c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2. RSMo.

111. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

112. Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT IX
Violation of Mo.Rev.Stat. 367.525.4
(borrower's ability to repay)

113. Plaintiff re-alleges and incorporated by reference all other paragraphs of this *Petition* as if fully set forth herein.

114. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

115. Missouri Revised Statute 367.525.4 requires a payday lender to consider the borrower's ability

to reason ably repay the loan in the time and manner specified when making or negotiating a loan.

116. Defendant failed to meaningfully or reasonably evaluate the Plaintiff's or Class' ability to repay the loans.

117. Defendant willfully and intentionally violated Missouri Revised Statute 367.525.4.

118. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan.

    b. paying on a loan that could have bean revoked within a day of obtaining it.

    c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

    d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2. RSMo.

119. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

120. Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT X
Violation of Mo.Rev.Stat. 367.527.3
(waiver of rights and protections)

121. Plaintiff re-alleges and incorporated by reference all other paragraphs of this *Petition* as if fully set forth herein.

122. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

123. Missouri Revised Statute 367.525.4 states that Defendant shall not accept any waiver of any right or any protection of a borrower.

124. Defendant includes in its contract a waiver that prohibits the Plaintiff or Class from participating in class actions and class arbitrations. The Merchandising Practices Act (§407.025.2) and Missouri Rule 52.08 provide consumers with rights to utilize class mechanisms.

125. Defendant willfully and intentionally violated Missouri Revised Statute 367.525.4.

126. As a direct result of Defendant's violations, Plaintiff and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiff's ability to repay the loan.

    b. paying on a loan that could have bean revoked within a day of obtaining it.

    c. paying excess interests and fees because the Defendant failed to reduce the principal by

at least 10% upon the third and subsequent renewals;

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2. RSMo.

127. Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

PRAYER FOR RELIEF

Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as follows:

a. Ordering that this action be maintained as a class action pursuant to Missouri Supreme Court Rule 52.08 and Missouri Revised Statute 407.025.3 and that the following class be certified;

All Missouri citizens who obtained any title loan from Defendant, where Defendant:

a. failed to disclose the monthly interest rate on the loan agreement; or

b. failed to provide a separate acknowledgement and disclosure of the required statement, namely, the following language:

"You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender's next full business day.";

or

c. failed to disclose the location where titled personal property may be delivered if the loan was not paid and the hours of operation of such locations receiving such deliveries; or

d. failed to provide borrowers with this required statement:

> NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2). This lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lose my automobile. _____ Borrower _____ Date

e. failed to consider the financial ability of the borrower to reasonably repay the loan in the time and manner specified in the loan contract; or

f. failed to reduce the principal amount of the loan by at least 10% of the original amount of the loan upon the third and subsequent renewals; or

g. required the borrower to waive rights and protections.

Excluded from the proposed class are defendant and its officers, directors, and employees, as well as employees of any of defendant's subsidiaries, affiliates, successors or assignees. Also excluded are the immediate family members of the above persons.

Also excluded is any trial judge who may preside over this case.

h. Ordering that all liens and loans entered into contrary to Missouri title loan statutes be declared void pursuant to Missouri Revised Statute 367.527.1.7 and 367.527.2.

i. Ordering that Defendant disgorge all money collected from all class members in excess of the amount of the principal loaned to Plaintiff and the Class;

j. Certifying Plaintiff as class representative and appointing Plaintiff's counsel as counsel for the Class;

k. Awarding Plaintiff and Class compensatory damages, to include any fees and interest illegally charged, and further awarding any damages caused by such payments;

l. Awarding Plaintiff and Class their consequential and incidental damages;

m. Awarding total Plaintiff and members of the class damages in excess of $25,000;

n. Awarding Plaintiff and Class pre-judgment and post-judgment interest as provided by law;

o. Awarding Plaintiff and Class punitive damages as provided by law;

p. Imposing a constructive trust and equitable lien against all money paid by the Class to and wrongfully withheld by Defendant;

q. Awarding Plaintiff and Class attorneys' fees and costs as provided by law;

r. That this Court enter a Preliminary and Permanent Injunction prohibiting Defendant from engaging in unfair or deceptive trade practices including the illegal omission of required disclosures and notice and the issuing of loans to customers without an evaluation of their ability to repay the loan in the time and manner prescribed.

s. Enter an Order that defendant abide by the terms of the spoliation letter attached to the *Petition* (*See* Attachment A).

t. Awarding Plaintiff and Class such other and further relief as may be just and proper.

u. Declaring that Defendant's arbitration clause is unconscionable, against Missouri public policy, and unenforceable.

Simon Passanante, PC

By:_____

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APPENDIX H

IN THE STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT
ST. LOUIS CITY

Case No.: 0722-CC-00015
Division: 7
Plaintiffs Demand Jury Trial

BEVERLY BREWER, ALTHEA PEETE, AND ANTHONY PIPKENS, Individually and on Behalf of All Others similarly situated,
Plaintiff,

v.

MISSOURI TITLE LOANS, INC.,
Defendant.

PLAINTIFFS' FIRST AMENDED PETITION

Plaintiffs Beverly Brewer, Althea Peete, and Anthony Pipkens (hereinafter "Plaintiffs"), individually and on behalf of similarly situated individuals described in this Petition, by and through their attorneys, brings this action against defendant Missouri Title Loans, Inc. ("Missouri Title Loans" or "Defendant"), as a result of Defendant's violations of the Missouri Merchandising Practices Act (Mo.Rev. Stat 407.010) and the laws governing title lenders (Mo.Rev.Stat 367.500 et seq.).

Overview[1]

1. Ms. Brewer took out a title loan to help with payment of her bills. On December 12, 2006, Defendant loaned Ms. Brewer $2,215.00, at 300.00% interest.

2. Ms. Brewer took out her loan at Defendant's office located at 8900 St. Charles Rock Road, St. Louis, MO 63114.

3. The terms of her loan contract stated she was required to pay back the full amount of principal plus a $564.37 finance charge of interest only one month later, totaling $2,779.37.

4. The contract number is TL-MO0320-061212-1144-00.

5. The form used by Defendant did not comply with title loan law, and Defendant failed to consider Ms. Brewer's ability to repay the loan.

6. Ms. Brewer made two payments toward the loan in January 2007 and February 2007, with the belief that the payments would go toward a reduction in the principal amount.

7. The payments, made on January 16, 2007 and February 13, 2007, totaled $1,147.00. However, after two payments on the loan, the principal was reduced by only $0.06 to $2,214.94.

8. Ms. Peete also took out a title loan to pay her bills.

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[1] Additional background material providing context for the allegations of this case is provided in the form of three attachments: A) Referenced Statutes; B) Historical Background on Title Loans; and C) a sample of the paperwork from the transactions of the added plaintiffs.

9. She is a mother of two adult children and she currently has custody of her teenage grandson.
10. On May 18, 2006 Defendant loaned Ms. Peete $608.50, at 360% interest. Ms. Peete took out her loan at Defendant's office located at 1937 Shenandoah, St. Louis, MO, 63104.
11. This amount included the principal she borrowed plus separate mandatory fees (Ms. Peete ended up with only $500 cash as she left Defendant's office). At the time she took out the loan, she collected disability of only $724.09 per month.
12. According to the terms of Defendant's loan contract, she was required to pay back the full amount of principal plus $186.05 of interest only one month later, a total of $794.55.
13. This amount was more than her total monthly income.
14. The contract number is TL-MO0214060518-0365-00.
15. The contract used by Defendant did not comply with Missouri title loan law and Defendant failed to consider Ms. Peete's ability to repay the loan.
16. Mr. Pipkens took out a title loan from Defendant on October 20, 2005.
17. Defendant loaned Mr. Pipkens $685.50 at 360% interest.
18. Mr. Pipkens took out his loan at Defendant's office located at 8900 St. Charles Rock Road, St. Louis, MO 63114.
19. The contract stated Mr. Pipkens was required to pay back the full principal amount of $685.50 plus a finance charge of $201.34, totaling $859.84.

20. Mr. Pipkens fell behind on payments. His car was taken by Defendant. Mr. Pipkens ultimately paid off the remaining balance and reclaimed his car.

21. Missouri Title failed to release the title to Mr. Pipkens. He subsequently got the title switched back to his name.

22. The contract number was TL-MO0320-051020-4213-00.

23. The contract used by Defendant did not comply with Missouri title loan law.

24. Defendant offers to lend money at high rates of interest.

25. In each transaction, Defendant marketed itself as a title lender, required a title to a car as security, provided a loan that falls within the regulation of the title loan statutes in place in Missouri; and each plaintiff believed they were receiving a title loan.

26. Defendant's commonly used name, as represented on its signs, is Missouri Title Loan.

27. Each loan to Plaintiff and Class posed a serious risk to their financial and emotional security because if Plaintiff and Class were unable to pay, they would lose their car, often their only asset and their transportation to work.

28. The Missouri legislature has passed several laws which attempt to protect the customers of title lenders from the potential hazards of title loans.[2] These statutes include:

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[2] All statutes referenced in this section are fully set out in Exhibit A.

- §367.518.1.4 RSMo requires that the monthly interest rate charged be disclosed on the loan agreement.
- §367.518.1.5 RSMo requires a statement providing the borrower the right to cancel the loan without any costs by the close of the next business day.
- §367.512.4 RSMo requires that upon the third renewal of the loan and all subsequent renewals, the principal be reduced by 10% until the loan is paid in full.
- §367.518.1.6 RSMo requires the disclosure of the hours and location where the titled personal property may be delivered.
- §367.525.1 RSMo requires title lenders to provide detailed statutory disclosures to borrowers.
- §367.525.4 RSMo requires title lenders to consider the financial ability of the borrower to reasonably repay the loan in the time and manner specified before making the loan.
- §367.527.1.3 RSMo prohibits a title lender from requiring a waiver of any right or protection of a borrower.
- §367.527.1.7 RSMo provides that a title lender shall not knowingly violate any sections under the Title Loan Section.
- §367.527.2 and §367.506.2 RSMo provides that if a title lender enters into a transaction in violation of the above statutes, then the lien and loan are void and that the borrower's only liability is for the principal.

29. In this case involving Plaintiffs, Defendant has disregarded each of the Missouri statutes set forth above in the following ways:

    a. Defendant failed to disclose the monthly interest rate on the loan agreement.

    b. Defendant failed to provide separate acknowledgement and disclosure of the required statement: "You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender's next full business day."

    c. Defendant failed to disclose the location where titled personal property may be delivered if the loan was not paid and the hours of operation of such rations receiving such deliveries.

    d. Defendant failed to provide disclosure of the required statement:

    NOTICE TO BOOROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2.) This lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lose my automobile. _____ Borrower _____ Date

    e. Defendant failed to assess Plaintiffs' ability to repay their loans.

    f. In at least one case, defendant failed to reduce the principal of the loan by 10% o upon the third and subsequent renewals;

g. Defendant has written provisions in their contract, including arbitration clauses which prohibit class actions and class arbitrations, which waive rights and protections of the borrower despite a prohibition of such terms.

PARTIES

30. Ms. Althea Peete is a Missouri citizen residing at 6111 Alabama Ave., St. Louis City, Missouri, 63111.

31. Ms. Beverly Brewer is a Missouri citizen residing at 9536 Lewis and Clark, St. Louis, Missouri, 63136.

32. Mr. Anthony Pipkens is a Missouri citizen residing at 1132 Cypress Village, Apartment l, St. Ann, Missouri 63074.

33. Missouri Title Loans, Inc. is a Missouri corporation licensed to issue title loans.

34. Missouri Title Loans, Inc. has approximately 58 stores in Missouri.

VENUE AND JURISDICTION

35. The Circuit Court of St. Louis City has subject matter jurisdiction over this action because the actions complained of took place in St. Louis City. V.A.M.S. 407.025.1; V.A.M.S, 408.562.

36. The Circuit Court of St. Louis City has personal jurisdiction over the Defendant because it regularly conducts business in St. Louis City.

37. Venue is proper in the Circuit Court of St. Louis City because the cause of action arose in St. Louis City. V.A.M.S. 407.025.1; V.A.M.S. 408.562.

CLASS ACTION ALLEGATIONS

38. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Missouri Revised Statute 407.025.3, Missouri Rule of Civil Procedure 52.08 and the other statutes and authorities referenced in this Petition. The claims asserted are brought on behalf of a statewide class of consumers.

39. The class and sub-classes are defined and described as follows:

All Missouri citizens who obtained any title loan from, Defendant, where Defendant:

A) failed to disclose the monthly interest rate on the loan agreement; or

B) failed to provide a separate acknowledgement and disclosure of the required statement, namely, the following language:

"You may cancel this loan without any costs by returning the fall principal amount to the tender by the close of the lender's next fall business day.";

or

C) failed to disclose the location where titled personal property may be delivered if the loan was not paid and the hours of operation of such locations receiving such deliveries; or

D) failed to provide borrowers with this required statement:

NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2.) This

lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lose my automobile. _____ Borrower _____ Date; or

F) failed to consider the financial ability of the borrower to reasonably repay the loan in the time and manner specified in the loan contract; or

G) failed reduce the principal amount of the loan by at least 10% of the original amount of the loan upon the third and subsequent renewals; or

H) required the borrower to waive rights and protections.

Excluded from the proposed class are defendant and its officers; directors, and employees, as well as employees of any of defendant's subsidiaries, affiliates, successors or assignees. Also excluded are the immediate family members of the above persons. Also excluded is any trial judge who may preside over this case.

40. The requirements for maintaining this action as a class action are satisfied, as set forth immediately below:

41. The proposed class is so numerous and so geographically dispersed that the individual joinder of all absent class members is impracticable. While the exact number of absent class members is unknown to Plaintiffs at this time, it is ascertainable by appropriate discovery and

Plaintiffs, upon information and belief, allege that the proposed class may include thousands of members. The requirement of numerosity is therefore satisfied.

42. Common questions of law or fact exist as to all proposed class members and predominate over any questions which affect Only individual members of the proposed class. These common questions of law or fact include:

    a. Whether Defendant failed to make statutorily required disclosures in the loan documents provided to Plaintiffs and Class Members;

    b. Whether Defendant failed to evaluate the ability of Plaintiffs and Class Members to repay loans in the manner and time specified;

    c. Whether Defendant failed to disclose specific notice requirements mandated by Missouri law;

    d. Whether Defendant required Plaintiffs and Class Members to waive their rights and protections in violation of Missouri law;

    e. Whether Defendant violated Missouri consumer protection laws pertaining to title loans;

    f. Whether Defendant violated Missouri law by failing to reduce the principal on Plaintiffs' and Class Members' loans by at least 10% upon the third and all subsequent renewals;

    g. Whether Plaintiffs and Class Members are entitled to punitive damages.

43. The claims of the Plaintiffs are typical of the claims of the class.

44. Plaintiffs will fairly and adequately represent the interests of the members of the class. Plaintiffs have no interest adverse to the interests of the members of the class. Plaintiffs have retained competent attorneys who have experience in class action litigation.

45. A class action is a superior method for the fair and efficient adjudication of this controversy. The adjudication of a separate action by individual members of the class would create a risk of a) inconsistent or varying adjudications with respect to individual members of the class; or b) adjudications with respect to individual members of the class which would as a, practical matter be "positive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

46. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members. There is no special interest in the members of the class individually controlling the prosecution of separate actions; the damages sustained by individual class members may be relatively small; and the expense and burden of individual litigation make it impossible for the class members individually to address the wrongs done to them.

47. There will be no difficulty managing this lawsuit as a class action in this Court. Furthermore, Defendant transacts substantial business in the State of Missouri and will therefore not be prejudiced or inconvenienced by the maintenance of the action in this forum.

COUNT I

Declaratory Relief - Arbitration Clause
Unconscionable and
Against Missouri Public Policy

48. Plaintiffs' re-allege and incorporate by reference all other paragraphs of this Petition as if fully set forth herein.

49. There is a present controversy between Defendant and Plaintiffs (and class members) because Defendant has placed an arbitration clause prohibiting class actions and class arbitrations in its loan contract. Plaintiffs and class members contend it is unenforceable, against Missouri public policy and unconscionable under state law.

50. Pursuant to Missouri Revised Statute 527.010 (the "Missouri Declaratory Judgment Act") any circuit court shall have the power to "declare rights, status, and other legal relations . . . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

51. The purpose of the Missouri Declaratory Judgment Act is to give "relief from uncertainty and insecurity." *See Preferred Physicians Mut. Management Group, Inc. v. Preferred Physicians Mut. Risk Retention Group*, 916 S.W. 2d 821, 823-24 (Mo. App. W.D. 1995). This court should consider public policy and interest, efficiency, convenience, economy and the good or bad faith of the parry bringing the declaratory judgment action in reaching its decision.

52. Plaintiffs' challenge that the arbitration clause is unconscionable and against public policy is directed against the arbitration clause only.

53. Plaintiffs do not challenge the validity of the contract as a whole.

54. Because Plaintiffs' challenge is to the validity of the arbitration clause only, it is an issue for the court to resolve. *See* 9 U.S.C.A. § 2 (allowing challenges to arbitration clauses on grounds existing at law); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204, 1209 (2006) (holding that arbitration clauses are severable from the rest of the contract); and *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103,107 (Mo, App. E.D. 2003) (holding that "generally applicable state law contract defenses, such as fraud, duress and unconscionability, may be used to invalidate arbitration agreements without contravening the FAA").

55. Defendant's arbitration clause is both procedurally and substantively unconscionable.

56. In the contracts of Plaintiffs and class members, Defendant included an arbitration clause that purports to require binding arbitration and which purports to prohibit class actions and class arbitration. The arbitration clause is attached as Attachment C. Defendant's contract language includes the following language:

> By agreeing to arbitrate disputes, borrower waives any right borrower may otherwise have had to litigate claims through a court or to have a jury trial. Further, unless a claim is already certified before the date of this agreement, borrower hereby agrees borrower may not

participate in a class action or a class-wide arbitration, either as a representative or member of any class or claimants pertaining to such claim and borrower hereby expressly waives borrower's right to join or represent such a class.

57. Defendant possesses bargaining strength and power that is far superior to that of Plaintiffs and its other customers. Without discussion or negotiation, Defendant requires its customers to sign standardized form arbitration clauses, drafted by Defendant, which are mini-contracts of adhesion because they are offered on a take-it-or-leave-it basis and the customer has the opportunity only to adhere to the arbitration clause.

58. Defendant's arbitration clause is substantially one-sided and unconscionable in favor of Defendant, and Defendant knows that the arbitration clause is substantially one-sided in its favor and unconscionable.

59. Defendant's arbitration clause purports to prohibit all class actions and all class arbitrations.

60. The arbitration clause purports to require Plaintiffs and Class to pay attorneys fees and costs and expert witness fees in order to seek to recover low amounts of damages in individual actions.

61. Defendant's arbitration clause requires the Plaintiffs to pay a $125 filing fee regardless of the value of the claim, but prohibits class arbitration or class actions.

62. Defendant's prohibition on class arbitration and class actions makes it impossible for most

members of the class to learn of the Defendant's violations.

63. Defendant's prohibition on class arbitration and class actions makes it difficult or impossible for those who do learn of the violations to find competent counsel to prosecute claims against Defendant.

64. Even if a consumer did learn of the violation and could find competent counsel, a reasonable consumer would be unlikely to pursue the claim because the cost of an individual arbitration, as well as filing fees, attorneys fees, expert fees and the wages claimants would lose pursuing such a claim, would often exceed the potential recovery.

65. In the absence of an arbitration clause barring class treatment of this case, the costs mentioned in the allegation above could normally be distributed among a class; Defendant has prohibited class arbitrations and class actions in order to grant itself *de facto* immunity.

66. Arbitration is designed to produce efficient resolution of issues.

67. Defendant has intentionally sought to use arbitration to produce inefficiency by requiring thousands of identical claims to be resolved one-by-one, in individual arbitration.

68. The arbitration clause strips Plaintiffs' and class members' right under Chapter 407 RSMo and the Missouri Rules of Civil Procedure 52.08 to pursue class actions against deceptive or unfair businesses, which is in violation of statute 367.527.3 RSMo prohibiting the waiver of any rights or protections.

69. When, as here, a class action ban is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money such waivers are unconscionable and should not be enforced. This is true because without the court's intervention "the company could continue its improper and deceptive charges ad infinitum since none of its customers would have a practical remedy to bring about a stop to the conduct." *See Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 314 (Mo. App. W.D. 2005).

70. Enforcing a clause which would prohibit class arbitration and class actions in a situation in which doing so would make it unlikely that consumers would be able to vindicate their rights under Missouri law is against public policy. *Doerhof v. General Growth Properties, Inc.*, 2006 WL 3210502 at 6 (Mo.W.D. 2006).

71. An average person would not reasonably expect that a dispute in which small damages have occurred to a large number of consumers would need to be resolved through arbitration on an individual case by case basis.

72. Pursuant to Missouri Revised Statute 527.010, a judicial determination is necessary and appropriate in order that the parties may ascertain their respective rights and duties with regard to the arbitration language Defendant has included in its loan contracts.

73. Plaintiffs and Class request discovery on the arbitration issue so that they may develop a factual record regarding procedural and substantive unconscionability.

74. Plaintiffs and Class hereby request a declaratory judgment, adjudicating, and declaring that Defendant's mandatory arbitration clause and waiver of class action rights is procedurally and substantively unconscionable, against Missouri public policy and unenforceable under Missouri law.

75. Plaintiffs and Class request that the Court enter judgment in their favor and against Defendant Title as described in the "Prayer for Relief' in this petition.

COUNT II
MISSOURI MERCHANDISING PRACTICES ACT

76. Plaintiffs re-allege and incorporate by reference all other paragraphs of this Petition as if fully set forth herein.

77. This claim is brought pursuant to the Missouri Merchandising Practices Act, R.S.Mo. § 407.010 *et seq*.

78. Plaintiffs and Class are entitled to bring this action pursuant to R.S.Mo. § 407.025.2.

79. Plaintiffs and Class entered into consumer transactions with Defendant in which the Plaintiffs would pay interest and fees as a condition for obtaining short term loans.

80. Lending is a service. Services are included in the definition of "merchandise" under Missouri Revised Statute 407.010.

81. Plaintiffs' and Class' loans were obtained exclusively for their personal use.

82. During the course of these transactions, Defendant engaged in unfair or deceptive trade practices including the issuing of loans induced by unlawful trade practice, deception, fraud, false pretense, misrepresentation, concealment, suppression, omission of, and the knowing failure to state, material facts, including:

    a. Omitting disclosures on the loan agreement as mandated by Missouri law (§367.518.4, §367.518.5, §367.518.6 RSMo);

    b. Omitting the required notice provision from Plaintiffs' and Class Members' loan agreements as required by Missouri law (§367.525.1 RSMo);

    c. Failing to tell Plaintiffs and Class Members that frequent renewals of loans would result in interest and fees that far exceeded the actual value of the loan (§367.512.4 RSMo);

    d. Paying excess interest and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

    e. Representing to Plaintiffs and Class that they were eligible for a title loan when in fact Defendant did not evaluate the Plaintiffs' and Class Members' ability to pay before loaning money (§367.525.4 RSMo); and

83. Defendant willfully and intentionally violated Missouri Revised Statute 407.010 *et seq.*

84. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

    b. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

    c. violation of statutorily required notice provision in the contract

    d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

85. Violating Missouri law in each of the ways set forth in the Class Definition, set forth above.

86. Plaintiffs and Class request that the court enter judgment in their favor and against Defendant as described in the *Prayer far Relief in this Petition.*

COUNT III
PER SE VIOLATION OF THE MISSOURI MERCHANDISING PRACTICES ACT

87. Plaintiffs re-allege and incorporate by reference all other paragraphs of this *Petition*, as if fully set forth herein.

88. This claim is brought pursuant to the Missouri Merchandising Practices Act, R.S.Mo. § 407.010 *et seq.* for *per se* violations based upon Missouri Law.

89. Plaintiffs and Class are entitled to bring this action pursuant to RS-Mo. § 407.025.2.

90. Plaintiffs and Class entered into consumer transactions with Defendant in which the Plaintiff would pay for the service of short term loans.

91. Lending is a service. Services are included in the definition of "merchandise" under Missouri Revised Statute 407.010.

92. The Plaintiffs' and Class' loans were obtained exclusively for their personal use.

93. During the course of these transactions, Defendant engaged in unfair or deceptive trade practices including the issuing of loans induced by unlawful trade practice, deception, fraud, false pretense, misrepresentation, concealment, suppression, omission of, and the knowing failure to state, material facts as defined by Missouri Law. These violations are *per se* violations of the Missouri Merchandising Practices Act:

    a. Defendant omitted the required disclosures on the loan agreements in violation of Missouri Revised Statutes 367.518.1.4, 367.518.1.5, and 367.518.1.6;

    b. Defendant omitted the required notice prior to obtaining the loan in violation of Missouri Revised Statute 367.525.1;

    c. Defendant deceptively renewed the Plaintiffs' and Class' loans without considering the financial ability of the borrowers to repay the loan in the time and manner specified in the loan contract in violation of Missouri Revised Statute 367.525.4.

d. Defendant deceptively failed to reduce the principal on the Plaintiffs' and Class' loans by at least 10% upon the third and all subsequent renewals in violation of Missouri Revised Statute 367.512.4;

e. Defendant fraudulently waived Plaintiffs' and Class' rights and protections in direct violation of Missouri Revised Statute 367.527.3.

94. Defendant willfully and intentionally violated Missouri Revised Statute 407.010 *et seq.*

95. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

b. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

c. paying on a loan that could have been revoked within a day of obtaining it.

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

96. Violating Missouri law in each of the ways set forth in the Class Definition, set forth above.

97. Plaintiffs and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition.*

COUNT IV
VIOLATION OF MO.REV.STAT. 367.518.1.4
(DISCLOSURE OF MONTHLY INTEREST RATE)

98. Plaintiffs re-allege and incorporate by reference all other paragraphs of this Petition, as if fully set forth herein.

99. Pursuant to Missouri Revised Statute 367.53 l, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

100. Missouri Revised Statute 367.518.1.4 states that each loan agreement shall disclose the monthly interest rate to be charged.

101. The Missouri Division of Finance has promulgated a form that if used, would comply with all required disclosures.

102. Defendant did not use such form.

103. Defendant violated Missouri Revised Statute 367.518.1.4 by failing to denote the monthly interest rate to be charged on the loan agreement provided to Plaintiffs and Class.

104. Defendant willfully and intentionally violated Missouri Revised Statute 367.518.1.4.

105. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

b. paying on a loan that could have been revoked within a day of obtaining it.

c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

106. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

107. Plaintiffs and Class Members request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition.*

COUNT V
VIOLATION OF MO.REV.STAT. 367.51.8.1.5
(DISCLOSURE OF ABILITY T O CANCEL)

108. Plaintiffs re-allege and incorporate by reference all other paragraphs of this Petition, as if fully set forth here

109. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

110. Missouri Revised Statute 367.518.1.5 requires the following disclosure to be disclosed on each loan agreement in at least ten-point font, bold type, separately acknowledged by the signature of the borrower and reading as follows:

> "You may cancel this loan without any costs by returning the full principal amount to the leader by the close of the lender's next full business day."

111. Defendant failed to include this disclosure anywhere in the loan agreement provided to Plaintiffs and Class.

112. Defendant willfully and intentionally violated Missouri Revised Statute 367.518.1.5.

113. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

    b. paying on a loan that could have been revoked within a day of obtaining it.

    c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

    d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

114. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

115. Plaintiffs and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT VI
VIOLATION OF MO.REV.STAT. 36.7.518.1.6
(DISCLOSURE DELIVERY OF PERSONAL PROPERTY)

116. Plaintiffs re-allege and incorporate by reference all other paragraphs of this Petition, as if fully set forth herein.

117. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

118. Missouri Revised Statute 367.518.1.6 requires that each loan agreement shall disclose the location where the titled personal property may be delivered if the loan is not paid and the hours such location is open for receiving such deliveries.

119. Defendant failed to disclose this information anywhere on the loan agreement provided to Plaintiffs and Class.

120. Defendant willfully and, intentionally violated Missouri Revised Statute 367.518.1.6.

121. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

b. paying on a loan that could have been revoked within a day of obtaining it.

c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

122. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

123. Plaintiffs and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition.*

COUNT VII
VIOLATION OF MO.REV.STAT. 367.512.4
(REDUCTION OF LOAN BY 10%)

124. Plaintiffs re-allege and incorporate by reference all other paragraphs of this Petition, as if fully set forth herein.

125. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

126. Missouri Revised Statute 367.512.4 requires upon the third renewal of any title loan agreement, and any subsequent renewal, the borrower shall reduce the principal by ten percent until such loan is paid in full.

127. Defendant failed to reduce the principal by 10% upon the third and subsequent renewals of the Plaintiffs' and Class' loans.

128. Defendant willfully and intentionally violated Missouri Revised Statute 367.512.4.

129. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

    b. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

    c. paying on a loan that could have been revoked within a day of obtaining it.

    d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

130. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

131. Plaintiffs and Class request that the Court enter judgment in their favor and against Defendant as described in the Prayer for Relief in this Petition.

COUNT VIII
VIOLATION OF MO.REV.STAT. 367.525.1
(NOTICE OF LOSS OF VEHICLE)

132. Plaintiffs re-allege and incorporate by reference all other paragraphs of this Petition, as if fully set forth herein.

133. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

134. Missouri Revised Statute 367.525.1 requires Defendant to provide the borrower the following notice in at least ten point bold type and receipt thereof shall be acknowledged by the signature of the borrower. This notice should be provided before the borrower accepting a title loan application and state. . .

> "NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2.) This lender offers short term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lose my automobile."

135. The Missouri Division of Finance has promulgated a form that if used, would comply with all necessary notice requirements.

136. Defendant did not use such form.

137. Upon information and belief, Defendant failed to provide this notice to Plaintiffs and Class.

138. Defendant willfully and intentionally violated Missouri Revised Statute 367.525.1.

139. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

    b. paying on a loan that could have been revoked within a day of obtaining it.

c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

140. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

141. Plaintiffs and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT IX
VIOLATION OF MO.REV.STAT. 367.525.4
(BORROWER'S ABILITY TO REPAY)

142. Plaintiffs re-allege and incorporate by reference all other paragraphs of this Petition, as if fully set forth herein.

143. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title loan transactions and provides a private right of action for violations of 367.500 to 367.533.

144. Missouri Revised Statute 367.525.4 requires a payday lender to consider the borrower's ability to reasonably repay the loan in the time and manner specified when making or negotiating a loan.

145. Defendant failed to meaningfully or reasonably evaluate the Plaintiffs' or Class' ability to repay the loans.

146. Defendant willfully and intentionally violated Missouri Revised Statute 367.525.4.

147. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

    b. paying on a loan that could have been revoked within a day of obtaining it.

    c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

    d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

148. Defendant has violated Missouri law in each of the ways set forth in the Class Definition, set forth above.

149. Plaintiffs and Class request that the Court enter judgment in their favor and against Defendant as described in the *Prayer for Relief* in this *Petition*.

COUNT X
VIOLATION OF MO.REV.STAT. 367.527.3
(WAIVER OF RIGHTS AND PROTECTIONS)

150. Plaintiffs re-allege and incorporate by reference all other paragraphs of this *Petition*, as if fully set forth herein.

151. Pursuant to Missouri Revised Statute 367.531, Missouri Revised Statute 408.562 applies to title

loan transactions and provides a private right of action for violations of 367.500 to 367.533.

152. Missouri Revised Statute 367.525.4 states that Defendant shall not accept any waiver of any right or any protection of a borrower.

153. Defendant includes in its contract a waiver of the constitutional right to a jury trial.

154. Defendant includes in its contract the right to file a lawsuit.

155. Defendant includes in its contract a waiver that prohibits the Plaintiffs or Class from participating in class actions and class arbitrations. The Merchandising Practices Act (§407.025) and Missouri Rule 52.08 provide consumers with rights to utilize class mechanism.

156. Defendant willfully and intentionally violated Missouri Revised Statute 367.525.4.

157. As a direct result of Defendant's violations, Plaintiffs and Class are aggrieved and suffered ascertainable losses by, among other things:

    a. paying principal, fees and interest on loans which were issued without consideration for the Plaintiffs' ability to repay the loan.

    b. paying on a loan that could have been revoked within a day of obtaining it.

    c. paying excess interests and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;

    d. paid fees and incurred costs excluding the principal amount of the loan in violation of §367.506.2 and §367.527.2 RSMo.

158. Plaintiffs and Class request that the Court, enter judgment in their favor and against Defendant as described in the Prayer for Relief in this Petition.

PRAYER FOR RELIEF

Plaintiffs and Class request that the Court enter judgment in their favor and against Defendant as follows:

a. Ordering that this action be maintained as a class action pursuant to Missouri Supreme Court Rule 52.08 and Missouri Revised Statute 407.025.3 and that the following class be certified:

All Missouri citizens who obtained any title loan from Defendant, where Defendant:

a. failed to disclose the monthly interest rate on the loan agreement; or

b. failed to provide a separate acknowledgement and disclosure of the required statement, namely, the following language;

"You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender's next full business day,";

or

c. failed to disclose the location where titled personal property may be delivered if the loan was not paid and the hours of operation of such locations receiving such deliveries; or

d. failed to provide borrowers with this required statement:

NOTICE TO BOOROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including—all finance charges, you may lose your automobile: (2.) This lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above 'NOTICE TO BORROWER' and I understand that if I do not repay this loan that I may lose my automobile. _____Borrower _____ Date;

e. failed to consider the financial ability of the borrower to reasonably repay the loan in the time and manner specified in the loan contract; or

f. failed reduce the principal amount of the loan by at least 10% of the original amount of the loan upon the third and subsequent renewals; or

g. required the borrower to waive any rights and protections.

Excluded from this proposed class are defendant and its officers, directors, and employees, as well as employees of any of defendant's subsidiaries, affiliates, successors or assignees. Also excluded are the immediate family members of the above persons. Also excluded is any trial judge who may preside over this case.

h. Ordering that all liens and loans entered into contrary to Missouri title loan statutes be declared void pursuant to Missouri Revised Statutes 367.527.1.7 and 367.527.2.

i. Ordering that Defendant disgorge all money collected from all class members in excess

of the amount of the principal loaned to Plaintiffs and the Class.

j. Certifying Plaintiffs as class representative and appointing Plaintiffs' counsel as counsel for the Class;

k. Awarding Plaintiffs and Class compensatory damages, to include any fees and interest illegally charged, and further awarding any damages caused by such payments;

l. Awarding Plaintiffs and Class their consequential and incidental damages;

m. Awarding total Plaintiffs and members of the class damages in excess of $25,000;

n. Awarding Plaintiffs and Class pre judgment and post judgment interest as provided bylaw;

o. Awarding Plaintiffs and Class punitive damages as provided by law;

p. Imposing a constructive trust and equitable lien against all money paid by the Class to and wrongfully withheld by Defendant;

q. Awarding Plaintiffs and Class attorneys' fees and costs as provided by law;

r. That this Court enter a Preliminary and Permanent Injunction prohibiting Defendant from engaging in unfair or deceptive trade practices including the illegal omission of required disclosures and notice and the issuing of loans to customers without an evaluation of their ability to repay the loan in the time and manner prescribed.

s. Enter an Order that defendant abide by the terms of the spoliation letter attached to the Petition (See Attachment A).

t. Declaring that Defendant's arbitration clause is unconscionable, against Missouri public policy, and unenforceable.

u. Awarding Plaintiffs and Class such other and further relief as may be just and proper.

Simon Passanante, PC

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2008, a true and accurate copy of the above and foregoing was mailed (by U.S. mail) and emailed to:

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EXHIBIT A

REFERENCED STATUTES AND INTERPRETATIONS

§367.506.2 RSMo

All title loan agreements entered into by a person who acts in violation of the licensing requirements of sections 367.500 to 367.533, and all title pledges accepted by such person, shall be null and void. Any borrower who enters into a title loan agreement with a person who acts in violation of the provisions of sections 367.500 to 367.533 shall not be bound by such agreement, and such borrower's only liability shall be for the return of the principal.

§367.518.1.4 RSMo

Each title loan agreement shall disclose the monthly interest rate to be charged.

§367.518.1.5 RSMo

Each title loan agreement shall disclose the a statement which shall be in at least ten-point bold type, separately acknowledged by the signature of the borrower and reading as follows: You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender's next full business day.

§367.512.4 RSMo

The title lender shall renew the title loan agreement upon the borrower's written request and the payment by the borrower of any interest due at the time of such renewal. However, upon the third renewal of any title loan agreement, and any subsequent renewal, the borrower shall reduce the principal by ten percent until such loan is paid in full.

§367.518.1.6 RSMo

Each title loan agreement shall disclose the location where the titled personal property may be delivered if the loan is not paid and the hours of such locations is open for receiving such deliveries.

§367.525.1 RSMo

Before accepting a title loan application, .the lender shall provide the borrower the following notice in at least ten-point bold type and receipt thereof shall be acknowledged by signature of the borrower...:

> NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loam If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2.) This lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above `NOTICE TO BORROWER' and I understand that i€ I do not repay this loan that I may lost my automobile. _____ Borrower _____ Date

§367.525.4 RSMo

When making or negotiating loans, the title lender shall take into consideration in determining the size and duration of a loan contract the financial ability of the borrower to reasonably repay the loan in the time and manner specified in the loan contract.

§367.527.1.3 RSMO

A title lender shall not accept any waiver of any right or protection of a borrower.

§367.527.1.7 RSMo

A title lender shall not knowingly violate any provision of sections 367.500-367.533 or any rule promulgated thereunder.

§367.527.2 RSMo

If a title lender enters into a transaction contrary to this section, the loan and the lien shall be void.

EXHIBIT B

Historical Background on Title Loans

In the 1980's, title lenders began appearing across the nation in states where the industry was allowed.[3] In the past two decades those states with loose or nonexistent standards have seen a surge in title lending.[4] In 2001, the Missouri State Auditor conducted a performance audit on the lending industry and at that time documented that there were 113 active title companies.[5] Currently, there are 297 active title lenders in Missouri.[6]

Title loans are short-term, high interest loans. Most loans have a 30 day term and are typically for small amounts (i.e. median minimum. loan is $175 and median maximum loan is $2500).[7] These loans are most often made to people in desperate financial situations and are secured by the title to personal property, such as an automobile.[8] The lender imposes a lien on the vehicle and requires that the borrower to give the lender the original title and a

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[3] Amanda Quester & Jean Ann Fox, *Car Title Lending Driving Borrowers to Financial Ruin* 9 (2005), http://www.responsiblelending.org/issues/cartitle/reports/page.jsp?itemID=28012462.

[4] *Id.* at 9.

[5] Claire McCaskill, State Auditor, Performance Audit Report No. 2001-36, at 8 (Mo. 2001).

[6] Missouri Division of Finance, Active Title Lender Licensee List, http://www.missouri-finance.org/upload/tl_list_906.pdf (Last Accessed October 18, 2006).

[7] Jean Ann Fox & Elizabeth Guy, Driven into Debt: CFA Car Title Loan Store and Online Survey 11 (2005), http://www.consmerfed.org/pdfs/Car_Title_Loan_Report_111705.pdf.

[8] Claire McCaskill, State Auditor, Performance Audit Report No. 2001-36, at 3 (Mo. 2001).

copy of the key to the car.[9] While the borrower generally keeps the car during the loan, in the event of a default, the lender repossesses the car using the key provided by the borrower.[10]

Many times, if the borrower is unable to pay the loan in full on the maturation date, the lender will advise the borrower to "renew" the loan.[11] This renewal also incurs additional charges.[12] The Auditor's Report provides a teal life example:

> A consumer obtained a title loan for $900 on July 7, 2000, renewed the loan 3 times paying $902 in interest and fees, but made no reductions, in the principal amount. The consumer obtained this loan against her 1993 Buick Century. She was 67 years old, living on a fixed income, and as of October 2000, her loan was still open. She has already paid the equivalent of the loan value in fees, and still owes the $900. This practice will continue until the consumer starts paying on the principal. In this example, the consumer is 'hanging on' by paying fees but has still not been able to satisfy the loan.[13]

This example illustrates that individuals who cannot come up with the whole loan amount often pay, in interest and fees alone, far more than the

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[9] Amanda Quester & Jean Ann Fox, Car Title Lending Driving Borrowers to Financial Ruin 4 (2005), http://www.responsiblelending.org/issues/cartitle/reports/page.jsp?itemID=28012462.

[10] *Id.* at 4.

[11] *Id.* at 6.

[12] *Id.* at 4.

[13] Claire McCaskill, State Auditor, Performance Audit Report No. 2001-36, at 4 (Mo. 2001).

original value of the loan because of the "renewal" process. In Missouri, "on average, title. . . lenders make 3.5 more renewal loans than new loans each month."[14]

Title loan borrowers are generally people on low or fixed incomes. The Missouri Auditor's report documented that 70% o of title and payday loan consumers earned less than $25,000 per year.[15] For many people, their vehicle is their only meaningful asset; it is a necessary means for obtaining and maintaining employment. As one research study points out, "Lack of transportation is widely recognized as one of the significant barriers to obtaining and maintaining employment, and for many title loan borrowers, public transportation is simply not available or not an acceptable substitute for a private vehicle."[16] Because title loans put borrowers in debt at high interest rates while placing their vehicle at risk, they have come under intense criticism throughout the nation.

For example, in Iowa, Governor Tom Vilsack has called for reforms and has characterized title loans as abusive lending.[17] The National Credit Union Administration has issued a formal declaration to federal credit union officials stating, "Title companies are urging, financial institutions to participate in these ventures (title lending). The NCUA wants to

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[14] *Id.*

[15] *Id.* at 3.

[16] Amanda Questar & Jean Ann Fox, *Car Title Lending Driving Borrower to Financial Ruin* 8 (2005), http://www.responsiblelending.org/issues/cartitle/reports/page.jsp?itemID=28012462.

[17] Car Title Loan Reform http://iowasenatedemocrats.org/Issues/cartitle/default.html (Last accessed October 18, 2006).

caution credit unions that funding arrangements with title loan companies introduce several risks to the financial stability and reputation of the credit union."[18] Consumer groups have joined in the cry for reform. The Center for Responsible Lending has stated, "Title lenders . . . should not be permitted to operate in the dark and out of the public eye. State lawmakers, regulators and the public will benefit from closer scrutiny of the car title lending industry . . ."[19]

In response to the dangers posed by title loans, the Missouri legislature has attempted to afford protection to those borrowing from title lenders.[20] *Missouri Revised Statute* 367.518.1.4 requires that the monthly interest rate charged be disclosed on the loan agreement. *Missouri Revised Statute* §367.518.1.5 requires a statement providing the borrower the right to cancel the loan without any costs by the close of the next business day. *Missouri Revised Statute* §367.518.1,6 requires the disclosure of the hours and location where the titled personal property may be delivered. *Missouri Revised Statute* §367,512.4 requires that upon the third renewal of the loan and all subsequent renewals, the principal be reduced by 10% until the loan is paid in full. *Missouri Revised Statute* §367.525.1 requires title lenders to provide specific statutory notice to borrowers before entering

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[18] National Credit Union Administration Letter http:// www.in.gov/dfi/policies/CU/03-FCU-06.pdf (Last accessed October 18, 2006).

[19] Amanda Questar & Jean Ann Fox, *Car Title Lending Driving Borrowers to Financial Ruin* 20 (2005), http://www.responsiblelending.org/issues/cartitle/reports/page.jsp?itemID=28012462.

[20] All statutes and interpretations referred to are reproduced in the section of this *Petition* entitled, "Referenced Statutes and Interpretations."

into the contract. *Missouri Revised Statute* §367.525.4 requires title lenders to consider the financial ability of the borrower to reasonably repay the loan in the time and manner specified before making the loan. *Missouri Revised Statute* §367.527.1.3 prohibits a title lender from requiring a waiver of any right or protection of a borrower. *Missouri Revised Statute* §367.527.1.7 provides that a title lender shall not knowingly violate any sections under the Title Loan Section. *Missouri Revised Statute* §367.527.2 and §367.506:2 provides that if a title lender enters into a transaction in violation of the above statutes, then the lien and loan are void and that the borrower's only liability is for the principal.

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No. 10-1027

Supreme Court, U.S.
FILED
MAR 17 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MISSOURI TITLES LOANS, INC.,

Petitioner,

v.

BEVERLY BREWER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Missouri Supreme Court's method of interpreting and applying the general Missouri state law contract defenses regarding unconscionability and exculpatory provisions is subject to review by this Court.

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ARGUMENT:
Reasons for Denying the Petition

In *Brewer v. Missouri Title Loans,* 323 S.W.2d 18, 20 (Mo. 2010), the Missouri Supreme Court held that a title lender who loaned money at rates exceeding 200% and who was alleged to have engaged in various forms of consumer fraud against thousands of consumers could not enforce a clause that functioned to immunize it from all claims by stripping its customers of all rights and remedies. The Missouri Supreme Court concluded that under general Missouri contract law 1) the clause was unconscionable and 2) the clause failed as an exculpatory clause because it was impermissibly ambiguous. In reaching its decision, the Missouri Supreme Court recognized and followed the Federal Arbitration Act ("FAA"), this Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, ___ U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), and Missouri common law regarding unconscionability and exculpatory clauses. The Court rooted its decision in the extensive factual record Respondent presented to the trial court.

Petitioner responded by filing its Petition for Writ of Certiorari. In summary, Petitioner's argument is that the Missouri Supreme Court created a special test for the enforceability of arbitration clauses that is preempted by the FAA. This is an unabashed indictment of the competence and credibility of the Missouri Supreme Court, as the Missouri Supreme Court specifically noted that it was applying general

contract law, that it recognized the preemptive boundaries of the FAA, and it cited to this Court's decision with precision and deference. Further, Petitioner has urged this Court to engage in fact finding and weighing of evidence regarding things such as whether to believe Respondent's expert witnesses, and the extent to which consumers can find representation for small damage claims in Missouri.

As such, Petitioner's request for review amounts to a request that this Court take on the entirely new role of deciding whether a state supreme court got state law right and that this Court sits as a second trial court. Any reversal of the decision in this case would require a conclusion that the Missouri Supreme Court, when it expressly stated it was following general Missouri state contract law and treating factual findings of the trial court level with deference, was either disingenuous or entirely incompetent.

Specifically, Petitioner argues that by its decision in *Brewer v. Missouri Title Loans*, the Missouri Supreme Court:

- Has shown that it is not competent to apply Missouri state law regarding the general contract defense of unconscionability (Petition, p. 14-20);
- Does not understand how to apply Missouri state court *evidence* with regard to unconscionability (Petition, pp. 26-30);
- Has shown "contempt" for arbitration (Petition, p. 31);

- Refuses to treat arbitration clauses "fairly" (Petition, p. 31); and
- Has intentionally ignored the FAA in order to advance "consumer-friendly public policy" (Petition, p. 20).

Petitioner's request for this Court to sit in judgment of state law, essentially as a second Missouri Supreme Court, should be seen for what it is: a request to reverse *Erie* and have this Court sit as the final word on state law in every state. This has never been work of this Court, however, and according to this Court's precedent and the United States Constitution, it cannot become the work of this Court. To the contrary, the highest court of a state should "utter the last word" regarding the law of a state, and is the best authority for discerning and applying the laws of that state. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 79 (1938). *Erie's* mandate was that federal courts lack the authority to create "federal general common law." 304 U.S. at 78. This mandate has a constitutional basis rooted in the limited jurisdiction of federal courts. *Id.* at 77-78. As this Court stated in *Erie*:

> And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in

> the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78. Petitioner seems to think that federal courts should dictate state law to state supreme courts. It's the other way around, of course: federal courts are constitutionally required to look to the rulings of state supreme courts to determine state law. Petitioner's reliance on federal arbitration cases, including the Eighth Circuit cases of *Cicle v. Chase Bank, USA,* 583 F.3d 549 (8th Cir. 2009) and *Pleasants v. American Express Co.,* 541 F.3d 853 (8th Cir. 2008), is absolutely inappropriate. Petitioner's Brief, pp. 21-23. In truth, the Eighth Circuit is constitutionally obliged to look to *Brewer* for the proper way to apply the state law contract defenses of unconscionability and exculpatory clauses.

Section 2 of the FAA provides as follows:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C.A. § 2. (Emphasis added). Any reasonable reading of the *Brewer* opinion will reveal that the Missouri Supreme Court was applying state law contract defenses to invalidate the Missouri Title Loans arbitration contract. The Missouri Supreme Court recognized the importance of applying only generally applicable state contract defenses at the outset of its opinion:

> [G]enerally applicable state law contract defenses such as fraud, duress and unconscionability may be used to invalidate all or part of an arbitration agreement without contravening the FAA.

323 S.W.2d 18, 20 (Mo. 2010).

The Missouri Supreme Court then proceeded to apply state law. The Court held that enforcing Petitioner's contract clause as written would mean that "none of [Petitioner's] customers would have a practical remedy to bring about a stop to the conduct. . . ." that was alleged to be illegal. The Court concluded that this stripping of rights by Petitioner and consequent immunization of Petitioner was unconscionable. *Id.* at 23-24. The Court also held that exculpatory clauses in Missouri are only enforceable if they are clear and unambiguous, and that Petitioner's clause had the "net result" of exculpating Petitioner, but failed to state this unambiguously. *Id.* at 24. These are not holdings limited to arbitration clauses.

The reasonable reading of *Brewer* is that it sets out general principles limiting that party's ability to

grant itself total immunity. Under *Brewer*, a defendant cannot include a class action waiver in any contract (whether or not it contained a duty to arbitrate) if it immunizes the defendant by stripping individuals of all remedies. The holding of *Brewer* appears to make it unconscionable to place a limitation on damages that would keep people from pursuing claims by making it economically irrational to do so. Such provisions could and sometimes do arise in the absence of an arbitration clause, yet they would all be unconscionable pursuant to *Brewer*.

Contrary to the Petition, this case is not about arbitration. The real issue is whether a party can immunize itself from suits based on Missouri consumer protection laws by inserting a class waiver into its contract, especially where that class waiver invites systematic and egregious violations of the law that causes financial damages to consumers. Petition ignores the central focus of this case and, instead, suggests that since many of the recent rulings regarding unconscionability have arisen in the context of arbitration, they must be unfairly targeting arbitration. This logical fallacy leaps off the page. Just because some decisions arose in the context of arbitration clauses does not mean the decisions are limited to arbitration clauses or hostile to them.

As such, Petitioner's request for review is rendered unnecessary by a careful reading of the majority opinion in *Brewer*. A careful reading reveals that Petitioner's summary of the decision has been heavily spun into a warped cartoon of the actual decision in

an effort to make it easier to challenge. In reality, the decision was carefully reasoned to be fully respectful of both federal and state law.

Respondent further requests that this Court deny the petition for writ of certiorari for these additional compelling reasons:

1. The Missouri Supreme Court *Brewer* decision "does not seriously erode federal policy" pursuant to 28 USC § 1257 and *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975). As indicated at the outset, *Brewer* involves the application of Missouri state contract law. As corroboration, large swathes of the Petition are dedicated to criticism of the manner in which the Missouri Supreme Court applied state contract law defenses. (Petition, pp. 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 27, 28, 29, 30 and 31).

2. The Missouri Supreme Court clearly indicated that the class waiver that was the focus of *Brewer* was unenforceable *for two independent reasons*. Petitioner barely mentions the second independent state law ground for striking that class waiver: that the clause was an improper exculpatory clause because it was ambiguous. The existence of this second well-established and independent basis for the failure of Petitioner's arbitration clause is reason, in and of itself, for denying the Petition for Writ.

3. Petitioner states that a pending decision of this court, *AT&T Mobility LLC v. Concepcion*,

No. 09-983, raises substantially similar questions to the questions raised in the petition for writ. To the extent that Petitioner's suggestion is accurate, its argument constitutes yet another compelling reason for denying the Petition; to the extent the Petition is correct, these issues will have already had the recent and proper attention of this Court.

4. Petitioner has failed to attach any copy of the title loan arbitration agreement (neither the text of the agreement nor a copy of the agreement in its tiny native font) anywhere within the 184-page package that Petitioner has submitted to this Court.

Respondent asks this Court to deny the Petition for each of the above-stated reasons. Petitioner has raised an issue of state law, not federal law question. Therefore, *Brewer* is not in conflict with governing Supreme Court precedent, and Petitioner has not presented any issue of federal law with significant practical consequences.

Trial Court Proceedings in *Brewer v. Missouri Title Loans*

Petitioner required each of its customers to hand over the original titles to their cars and sets of their car keys in order to receive a loan. App. 96a-98a.[1]

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[1] All references to the Appendix ("App.") are to the Petitioner's Appendix.

Respondent-Plaintiff Beverly Brewer alleges that she took out a $2,215 loan from Defendant. App. 96a.[2] Her loan accrued interest at a rate of 300%. App. 97a. Over the next two months, she paid Petitioner two separate payments totaling about $1,147.00. These two payments reduced her loan principal by six cents ($.06). App. 96a.

Ms. Brewer filed this class action against Petitioner-Defendant Missouri Title Loans, alleging that it systematically violated numerous Missouri statutory provisions specifically pertaining to title loans. Those statutory provisions are listed in an attachment to the Amended Petition. App. 130a. Respondent further alleged that Petitioner:

- Failed to make state-mandated disclosures on the loan agreement;
- Failed to tell customers that frequent renewals of loans would result in interest and fees that far exceeded the actual value of the loans;
- Charged excess interest and fees; and
- Failing to evaluate the customers' ability to pay before loaning money.

App. 99a-100a.

---

[2] The Respondents' *First Amended Petition* included three plaintiffs, Beverly Brewer, Althea Peete, and Anthony Pipkens. The case proceeded to resolution in the trial court with only one of the plaintiffs, Beverly Brewer.

Respondent alleged that Petitioner violated these Missouri loan laws with regard to tens of thousands of other Missouri citizens. In her Class Action Petition, Respondent asked Petitioner to compensate its Missouri customers for all damages caused by Petitioner's violations of Missouri laws. App. 102a-103a.

Respondent further alleged that Petitioner's contract was unconscionable. App. 107a. She alleged that Petitioner's arbitration provision contained a class waiver that barred Respondent from filing any sort of class claims, both class actions and class arbitrations. App. 106a-107a. Respondent alleged that Petitioner's arbitration clause "requires the Plaintiffs to pay $125 filing fee regardless of the value of the claim, but prohibits class arbitration or class actions." App. 108a. The trial court found that Petitioner's arbitration clause required that the parties bore all arbitration costs and expenses, "including fees for attorneys, experts and witnesses." App. 46a. The Petitioner attempted to retract this language "in an eleventh hour change" at the trial court, but the trial court ruled that, pursuant to settled Missouri law, Petitioner's arbitration clause should be evaluated as it existed at the time of the transaction. App. 47a.

Based on its evidentiary hearing, the trial court ruled that the arbitration clause of Petitioner was unconscionable and therefore unenforceable as written because it immunized Petitioner from the claims

of its customers.[3] App. 42a. The trial court also ruled that Petitioner's arbitration clause was "unenforceable for an entirely separate ground: it functions as an exculpatory provision," violating long-standing Missouri law that such provisions must be "clearly worded and unambiguous." App. 47a. The trial court severed the part of the arbitration clause that it had found to be unconscionable (the class waiver) from what it otherwise considered to be (pre *Stolt-Nielsen*) an enforceable contract. The trial court sent the case to class arbitration, "because the arbitration clause at issue contains a severability clause. . . ." App. 47a.

Missouri Appellate Court Proceedings in *Brewer v. Missouri Title Loans*

The decision by the trial Court was affirmed by the Missouri Court of Appeals (App. 24a) and eventually reached the Missouri Supreme Court (App. 1a). *Brewer v. Missouri Title Loans*, 323 S.W.2d 18, 20 (Mo. 2010). The Supreme Court of Missouri invalidated the class arbitration waiver on the same two independent grounds applied by the trial court: Petitioner's arbitration clause was unconscionable *and* it constituted an impermissible exculpatory clause.

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[3] The trial court decision occurred before the *Stolt-Nielsen* opinion was handed down.

In coming to its decision, the Missouri Supreme Court carefully considered the then-recent United States Supreme Court case of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, ___ U.S. ___, 130 S. Ct. 1758 (2010). The Court interpreted *Stolt-Nielsen* as holding that parties cannot be compelled to submit a dispute to class arbitration either when the arbitration agreement is silent as to class arbitration or when it specifically prohibits class arbitration. 323 S.W.3d at 21. The *Brewer* court concluded that *Stolt-Nielsen* "requires an affirmative consent to class arbitration before it may be compelled. . . ." 323 S.W.3d at 20-21.

According to the *Brewer* Court, the holding of *Stolt-Nielsen*, 130 S. Ct. 1758, did not require individual arbitration – certainly not in a case where the class waiver was unconscionable. *Id.* at 21. The Court held that simply invalidating the class waiver and sending the case to individual arbitration would not remedy the unconscionable aspects of the arbitration contract. *Id.* Even if the unconscionable class waiver were invalidated and severed from the arbitration contract, Respondent would be required to submit to *individual* arbitration. The Court held that individual arbitration is not a proper remedy when individual arbitration is not "economically practical or feasible because the amount in controversy is so small in relationship to the risks and costs involved that a reasonable attorney would not take the case. . . ." *Id.* The Court concluded that this difficulty could be avoided "only by permitting litigation of this matter as part of a class action, and as there is no affirmative

agreement to class arbitration, the class action must proceed in court." *Id.* The Court cautioned that this remedy of striking the entire arbitration clause and sending the case to court for class action is not appropriate in every case:

> It is only when the practical effect of forcing a case to individual arbitration is to deny the injured party a remedy – because a reasonable attorney would not take the suit if it could not be brought on a class basis either in court or through class arbitration that – a requirement for individual arbitration is unconscionable.

Id. The Court then examined the title lender's arbitration clause, holding that even though there are often procedural and substantive aspects to unconscionability, it is not necessary to find both procedural and substantive unconscionability to invalidate a contract clause. "Under Missouri law, unconscionability can be procedural, substantive or a combination of both." *Id.*

The Supreme Court of Missouri upheld the trial court's determination that the arbitration waiver was unconscionable. *Id.* at 23. With regard to procedural unconscionability, the Court found that the loan agreement was nonnegotiable and difficult for the average consumer to understand. *Id.* The trial court had also found that the title lender was in a superior bargaining position relative to the customer. *Id.* The Court also concurred with the trial court's finding that there was substantial evidence of substantive

unconscionability in this case, based on expert testimony from three consumer lawyers who testified in the trial court (consumer attorneys Bernard Brown, Dale Irwin, and John Ammann, a professor at St. Louis University School of Law):

> Brewer also introduced substantial evidence of substantive unconscionability. Brewer presented expert testimony from three consumer lawyers who testified it was unlikely that a consumer could retain counsel to pursue individual claims. John Ammann, a professor from St. Louis University School of Law, testified that it would be very hard, "if not impossible," for a consumer to find counsel to handle a claim under the loan agreement because it is a complicated area of law. Such a claim would require significant expertise and discovery; therefore, it would not be financially viable for an attorney because of the complicated nature of the case and the small damages at issue. Bernard Brown, another expert testifying on behalf of Brewer, testified it would be "exceedingly difficult," if not "outright rare," to find representation for individual claims. The final expert, Dale Irwin, testified that the likelihood of an individual finding an attorney to represent him or her was "virtually nil" because of the small damages and the likelihood of a "heavily defended" Petitioner such as Missouri Title Loans.

Id. The damages sought by the plaintiff stemmed from a title loan in the amount of $2,215. *Id.* at 20. The Court held that the plaintiff's inability to retain

counsel (were the plaintiff forced to try the case individually, not as a class proceeding) "leaves the consumer with no meaningful avenue of redressing complicated statutory and common law claims." *Id.* at 23. The Court stated:

> [T]he net result of the class arbitration waiver in this case is that *Brewer* effectively forfeited legal counsel in any claim that arose under the loan agreement. To hold otherwise would allow lenders to continue unfair lending practices "since none of its customers would have a practical remedy to bring about a stop to the conduct." [citations omitted] Furthermore, because *Brewer* proved that the class arbitration waiver was unconscionable, the unavailability of class arbitration under the FAA means that the entire arbitration agreement is rendered unconscionable. Given that class arbitration is not an option in this case, the only way to remedy the unconscionability in this case is to strike the entire arbitration agreement.

Id. at 23.

The *Brewer* Court agreed with the holding in *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, (Mo. App. E.D. 2008), that substantive unconscionability exists when the plaintiff "effectively forfeited legal counsel in any claim that arose under the loan agreement. To hold otherwise would allow lenders to continue unfair lending practices 'since none of its customers would have a practical remedy to bring about a stop to the conduct.'" *Id.* at 23.

Because class arbitration would not be available under the FAA, the Court deemed that the entire arbitration agreement was rendered unconscionable. Therefore, the Court modified the trial court ruling (which had been entered prior to the decision in *Stolt-Nielsen*) by striking the entire arbitration agreement. Petitioner's arbitration provisions contained a severability clause. . . ." App. 47a.

The *Brewer* Court also ruled that the defendant's class waiver failed as an exculpatory clause because it was not clear and unambiguous, as required by long-standing Missouri common law pertaining to contracts. *Id.* at 24. "A defendant cannot exculpate itself from liability unless the language is clear and unambiguous." *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 334 (Mo. banc 1996). In order for the exculpatory clause to be enforceable, it was not enough that the consumer knew she was giving up the right to a class proceeding. To be enforceable, it must also be clear that "the consumer realizes that he or she effectively is bypassing the opportunity to retain counsel to litigate a claim against the lender." *Brewer, supra,* at 24. In this case, the Court held that nothing in the class waiver "unambiguously informs the consumer that the net result of the waiver is that the lender effectively is immunized from liability." *Id.* As this Court can clearly see from the relevant section of *Brewer,* the problem with Petitioner's exculpatory clause had absolutely nothing to do with whether the case was tried in court or in arbitration. It was absolutely neutral as to arbitration.

Responses to Specific Arguments of Petitioner

Petitioner claims that the Missouri Supreme Court has utilized a "special test" for unconscionability. Petition, p. 7. Petitioner is mistaken. As stated by the *Brewer* dissent, an unconscionable contract is an agreement "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Smith v. Kriska,* 113 S.W.3d 293, 298 (Mo. App. 2003). Section 400.2-302(1), RSMo, gives further guidance as to Missouri's method of determining unconscionability:

> If the court as a matter of law finds that the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Compare this passage to the majority holding in *Brewer,* in which the court recognized "There are procedural and substantive *aspects* to unconscionability." *Brewer*, 323 S.W.3d at 22 (emphasis added). The *Brewer* decision did not announce any new special test for arbitration. The *Brewer* court stated that the substantive/procedural distinction presents merely "an acceptable analytical *framework* for most cases because a party who employs procedurally unconscionable bargaining tactics usually

does so with the goal of inducing the other party into a one-sided contract." *Id.* (emphasis added).

By these passages, the Missouri Supreme Court is recounting the obvious, that there are procedural and substantive "aspects" to unconscionability; there are aspects of unfairness that have to do with contract formation and others that have to do with the harshness of the contract terms. Together they form an evidentiary "framework" to which courts then determine whether unconscionability exists. The "framework" is not the test. There is no suggestion in *Brewer* that the unconscionability test that a Missouri court must ultimately apply to the evidence it has gathered is any different than the general test cited by the dissent. The dissent does not point to any different test used by the majority and, in fact, can't do so. *See* App. 13a, footnote 1 (where the dissent states "It is not clear what definition of 'unconscionability' the majority is using."). The actual test for unconscionability of any contract in Missouri, though not articulated by the *Brewer* majority, is clearly set forth in *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107-08 (Mo. App. E.D. 2003), a case cited with approval by the *Brewer* majority. *Swain* states the test in a passage that makes it clear that the existence of a mandatory arbitration provision does not bear on unconscionability:

> As to the agreement to arbitrate generally, however, we find that an average person would reasonably expect that disputes arising out of an agreement like this might have

> to be resolved in arbitration. An agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair. It is not an agreement "such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other. . . ." *Hume v. United States,* 132 U.S. 406, 415, 10 S.Ct. 134, 33 L.Ed. 393 (1889) (defining unconscionable contract). Nor does requiring arbitration present "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it" or constitute an unduly harsh term of the contract. [citations omitted].

Swain v. Auto Services, Inc., 128 S.W.3d 103, 107-08 (Mo. App. E.D. 2003).

The *Brewer* majority recognized that "there are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone." *Id.* at 22. The Court further noted that various decisions of the Missouri court of appeals "have held that there must be both procedural and substantive unconscionability before a contract or a clause can be voided," but indicated that this approach is not accurate. *Id.* The Court then offered the comment that this procedural/substantive framework provides "an acceptable analytical framework for most cases" because these two aspects of unconscionability are often found together, where a

party unfairly induces the other party to enter a one-sided contract. The Court also made clear, however, that under Missouri law, "unconscionability can be procedural, substantive or a combination of both." *Id.*

At page 31 of its Petition, Petitioner argues that *Brewer* made a finding of unconscionability "solely" on the basis of substantive unconscionability. Petitioner has catastrophically misconstrued the facts of this case. The Missouri Supreme Court majority opinion in *Brewer* plainly held that there was ample evidence of procedural unconscionability in this case:

> With respect to procedural unconscionability, there was evidence that the loan agreement was non-negotiable and difficult for the average consumer to understand and that Missouri Title Loans was in a superior bargaining position. As Brewer notes, this evidence is virtually identical to *Woods*, 280 S.W.3d at 96, in which the court of appeals affirmed a judgment finding that a class arbitration waiver provision contained in payday lender's loan contract was unconscionable. As in the present case, the evidence in *Woods* demonstrated that the lender was in a superior bargaining position because the high-interest loan agreement was offered to people in financial distress on a take-it or leave-it basis. As in *Woods*, there is sufficient evidence in this case to support the trial court's finding of procedural unconscionability.

323 S.W.3d at 23. The dissent of Judge Breckenridge also recognized that the *Brewer* majority recognized the existence of procedural unconscionability. App. 23a. Therefore, Petitioner's arguments based upon its assertion that *Brewer* supposedly lacked procedural unconscionability should be ignored.

Contrary to Petitioner's arguments, the Missouri Supreme Court's construction of *Stolt-Nielsen* does not turn that case "on its head." Petition, p. 5. To turn *Stolt-Nielsen* on its head would be to force parties who have not expressly agreed to class arbitration to class arbitrate a dispute. That's not what happened in this case. As can be seen in the majority opinion, the Missouri Supreme Court went to great pains to abide by the holding of *Stolt-Nielsen*. And no part of the FAA and no holding by this Court (certainly not *Stolt-Nielsen*) have ever encouraged any state court to deny a party the opportunity to raise or prove any general state law contract defenses. To do that would violate Section 2 of the FAA, yet it appears to be Petitioner's interpretation of *Stolt-Nielsen* that the Missouri Supreme Court was under a federal duty to deny the Respondent the right to have the court consider her two independent general contract law defenses.

What does Petitioner propose in this situation? What should a court do where a class waiver is unenforceable pursuant to general state contract law and yet, according to *Stolt-Nielsen*, an arbitration of the case would necessarily be limited to resolving a single small-damages case? Petitioner's "solution" seems to be this: Send the individual small-damages case to

arbitration and ignore thousands of substantially similar claims brought by other victims, even where these other violations were the result of systemic violations by a predatory lender. Petitioner's "solution" is that thousands of similarly-situated claimants will be prevented from resolving their claims, either in court or in arbitration, despite the substantial evidence (presented by three expert attorneys in this case) that they will remain ignorant of their claims. Moreover, even if those victims do somehow determine that complex predatory lending laws of Missouri have been violated, they will have no meaningful way to obtain legal representation. In short, Petitioner's "solution" to the problem faced by the Missouri Supreme Court is that the legal system is powerless to stop systematic illegal activity by predatory lenders or to formulate any sort of remedy that would compensate thousands of similarly-situated victims.

The sad irony, of course, is that Petitioner's "solution" would not only prohibit any sort of class proceedings. In the real world, it would also prohibit any individual claims. The undisputed evidence in this predatory lending case proves that claimants will have an extraordinarily difficult time finding attorneys. It is regrettable but undeniable that there is no meaningful incentive for attorneys to take these sorts of cases. As indicated above, three consumer attorneys produced by Mrs. Brewer testified that it would be extraordinarily difficult for any of these consumers

to find attorneys to represent them in these small value cases. App. 8a.

Petitioner had ample opportunity to bring forth attorneys to state that they *would* be willing to handle these types of cases individually or even that they knew of other attorneys who would handle these types of cases individually. Petitioner failed to produce even a single attorney to testify in this manner, despite the fact that there are many thousands of licensed attorneys practicing in the state of Missouri. Petitioner would rather, at this late date, wave its hands and argue that it could have produced such testimony. Instead of providing real evidence, Petitioner questions the undisputed record. Petitioner has also chosen to criticize one of the three career consumer attorney experts called by Respondent, Dale Irwin, criticizing Mr. Irwin that he had the audacity to represent *four* consumers in individual low damage cases during his illustrious career. Apparently, Petitioner is arguing that because Mr. Irwin represented four individuals in small damage cases, tens of thousands of victims of Missouri title loan will be easily available to find attorneys to represent them individually in arbitrations.

Petitioner argues that consumers supposedly *have* the ability to obtain meaningful representation despite the fact, established through testimony before the *Brewer* trial court, that there is only a relative smattering of private practitioners engaged in the practice of consumer law throughout the state. This testimony was unanimous and detailed, as suggested

in the majority opinion of the Missouri Supreme Court. 323 S.W.3d at 23. Petitioner's assurance that attorneys will handle these small-damages cases because attorney's fees are allowed by the Merchandising Practices Act is made up out of thin air. As indicated, three career consumer attorneys who practice in Missouri testified to the contrary before the Missouri trial court, and their testimony was carefully considered by the Missouri Supreme Court. These experts indicated that, based upon their own experience, trial judges are rarely willing to award attorney's fees in excess of the value of damages recovered by the plaintiff.

Petitioner has made these wild arguments that financially stressed consumers can find attorneys despite the existence of the lopsided contract at stake in this case. Petitioner's contract required both parties to be responsible for bearing arbitration costs and expenses, "including fees for attorneys, experts, and witnesses." App. 46a. Respondent alleged that Petitioner's arbitration clause required the Plaintiffs to pay $125 filing fee regardless of the value of the claim. App. 108a. This arbitration clause was so lopsided that Petitioner attempted to retract this language "in an eleventh hour change" in the middle of the hearing to determine whether Petitioner's arbitration clause was enforceable. App. 47a.

Petitioner has not produced a copy of its arbitration clause. The record that does exist before this Court makes it clear that Petitioner's arbitration clause was not a modern-era arbitration clause

offered in an effort to make arbitration look like an attractive idea. Petitioner's arbitration clause is from an older era when merchants imposed "arbitration clauses" that were never expected to be used by consumers. These sorts of provisions, and this includes Petitioner's provisions, function as *anti*-arbitration clauses. They have historically been used like big sticks to beat consumers into submission if ever any of them figure out that they are being ripped off. Petitioner's arbitration clause, based upon the clear wording of the provision, functions as one of these prototypical old-era anti-arbitration clauses. It is a wolf in sheep's clothing; it looks like an attractive option but it functions as a lock-tight exculpatory clause. Never has this Court indicated that it is in the business of enforcing arbitration clauses that function to deny consumers their basic rights. That day should never come.

The trial court considered substantial amounts of real-world evidence in order to answer the questions before it and the Missouri Supreme Court reviewed the same evidence in coming to its own conclusion. The choices for the Missouri Supreme Court were limited. It needed to give the claimants their day in court, but it also needed to abide by the FAA, subject to general state law contract defenses. Based on its careful analysis, the Missouri Supreme Court found a way to accommodate each of these objectives. That solution required striking the arbitration clause entirely, which was also done in accordance with Petitioner's own severability clause and in accordance

with arbitration-neutral general state contract law. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 108-09 (Mo. App. E.D. 2003). The alternative – forcing Respondent's case into individual arbitration – would have denied meaningful access to Respondent and other class members.

If the Petitioner had its way, how would any of the alleged victims get a day in court or in arbitration? Perhaps Petitioner believes that an army of experienced consumer attorneys will somehow show up out of nowhere, each of them offering to handle complex predatory lending cases for a few hundred dollars each, despite the fact that each of these individual cases would involve considerable hours of lawyering, plus the significant costs of depositions, experts, appeals, court costs, and arbitration fees.

Petitioner has nothing significant to say about Respondent's second and independent objection that Petitioner's arbitration clause functioned as an improper exculpatory provision (Petitioner dedicates about 10 words to the topic at p. 24 of the Petition). Respondent is silent even though the Missouri Supreme Court highlighted this second independent defense and indicated that this second state law defense plainly and independently applied in this case.

At page 5, Petitioner complains that it must now "defend a class action in court, as if the arbitration agreement never even existed." The truth is that Petitioner will now need to defend this case in court as if its *unconscionable* and *exculpatory* arbitration

clause never existed. Petitioner had the opportunity to draft a clause that wouldn't exonerate itself from systematic wrongdoing, but it didn't take that path. In light of its free choice to take the road to unbridled strong-arming of consumers, it is not in any position to complain. To the extent that Petitioner ever decides to write an *enforceable* arbitration clause in the future, the FAA and the Missouri Supreme Court will not serve as obstacles to arbitration.

The Missouri Supreme Court resolved the present matter based upon law that applies to all contracts, namely law relating to unconscionability and exculpatory clauses. It concluded that Missouri Title Loan's contract was unconscionable and that it also served as an exculpatory clause that, due to its ambiguity, was unenforceable under Missouri contract law. Petitioner contends that the holding is preempted, pursuant to the Federal Arbitration Act, arguing that the Missouri Supreme Court created a special test for arbitration clauses. This argument suggests that the Missouri Supreme Court's majority opinion is insincere and/or that the Missouri Supreme Court was confused as to what Missouri law is. To the contrary, the *Brewer* majority expressly states it is following general Missouri contract law and that it is fully aware of its obligation to treat arbitration clauses as it would any other contract.

As a result, Petitioner's request for a decision from this Court is a request to have this Court decide what does and does not constitute general Missouri

contract law. This is not the sort of work in which this Court engages.

CONCLUSION

For the above-stated reasons, Respondent respectfully asks this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MISSOURI TITLE LOANS, INC.,
Petitioner,

v.

BEVERLY BREWER,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Instead of responding to Missouri Title's petition, Brewer's brief in opposition argues the merits of her case and throws out assorted red herrings. For example, she claims that the petition insults the Supreme Court of Missouri. Br. at 1-3. Any petition for certiorari – any appeal, for that matter – will necessarily argue that the lower court got it wrong. There is nothing insulting about seeking certiorari.

Similarly, Brewer argues that Missouri Title is asking this Court to review pure questions of state law. Br. at 3-4. The Federal Arbitration Act (FAA) applies to proceedings in state court. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). The first

question this petition asks is whether the FAA preempts state law that requires consent to class arbitration as a condition of ordering arbitration. The second question is whether Missouri courts are using generally applicable principles of state law in the enforcement of arbitration clauses, as required by the FAA.

Both of these are federal questions, as this Court has repeatedly recognized. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (reversing Alabama Supreme Court and holding that FAA preempted state statute invalidating pre-dispute arbitration agreements); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (reversing Montana Supreme Court and holding that FAA preempted state statute imposing special typographical requirements on arbitration provisions that were not required for other types of contractual provisions); *Southland Corp.*, 465 U.S. at 15 (reversing California Supreme Court and holding that FAA preempts state statute requiring judicial consideration of franchise claims).

Finally, Brewer repeatedly argues that the petition does not challenge the "second holding" of the court below. Br. at 5; 7; 26. Before the Supreme Court of Missouri, Missouri Title argued, in the alternative, that the arbitration clause was enforceable as a valid exculpatory clause, a proposition that Court rejected. That is quite irrelevant to Missouri Title's argument here that the federal policy in favor of arbitration trumps Missouri's preference for class actions and that Missouri courts do not fairly enforce arbitration clauses, at least in the employee/consumer context. If Missouri Title prevails on either question, Brewer

must arbitrate her individual case regardless of whether the clause is exculpatory.

I. THIS CASE PRESENTS THE SAME FAA PREEMPTION QUESTION THAT IS PRESENTLY UNDER ADVISEMENT IN *AT&T MOBILITY LLC V. CONCEPCION.*

Brewer does not dispute that the first question presented is substantially similar to the question presented in *AT&T Mobility LLC v. Concepcion*, No. 09-983, argued before this Court on November 9, 2010. Instead, she argues that this is a "compelling reason for denying the Petition," because *Conception* will resolve the issue.

This argument is completely illogical. However *Conception* comes out, its holding is likely to affect this case. Given the substantial similarity of the questions presented, this Court should at minimum hold the petition pending its decision in *Concepcion*. It should then grant the petition, vacate the judgment and remand for further consideration in light of *Concepcion*. *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, __ U.S. __, 130 S. Ct. 2401 (2010) (granting the petition and remanding for reconsideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010)); *Hughes Elec. Corp. v. Garcia*, 540 U.S. 801 (2003) (granting the petition and remanding for reconsideration in light of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)).

Given the breadth of the holding below, that disposition would be appropriate even if this Court affirms *Concepcion*. Most consumer fraud cases involve a relatively small sum of money, less than the $4,000 at issue here. The Supreme Court of Missouri has

effectively invalidated arbitration in all of these cases, based on the empirically false assumption that statutory attorneys' fee provisions are insufficient to attract lawyers to individual, low-dollar cases.

II. THE SUPREME COURT OF MISSOURI'S RULING CONFLICTS WITH THE FAA, DECISIONS OF THIS COURT AND THE VAST MAJORITY OF FEDERAL AND STATE APPELLATE COURT OPINIONS ON THE VALIDITY OF CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS.

The petition established that the decision below is contrary to the great majority of federal opinions, and a significant number of state opinions, addressing the enforceability of arbitration clauses in consumer fraud cases. Brewer does not even try to respond.

Instead, she resorts to rhetoric: "[w]hat should a court do" when the failure to allow class arbitration allegedly makes a contract unconscionable? Br. at 21-22. The only answer that comports with the FAA is to compel respondent to arbitrate her claims on an individual basis. Regardless of the class issues, there is still an agreement to arbitrate – an agreement by the parties to resolve disputes *outside the court system* – that remains "valid, irrevocable, and enforceable" under the FAA. 9 U.S.C. § 2. The decision of the Supreme Court of Missouri to order class litigation in court because class arbitration was not possible is analogous to the "industrial justice" dispensed by the arbitrators in *Stolt-Nielsen*, __ U.S. at __, 130 S. Ct. at 1767, and is no less repugnant to the FAA:

> While the interpretation of an arbitration agreement is generally a matter of state law . . . , the FAA imposes certain rules of fundamental importance . . . .
>
> . . . . [T]he central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.
>
> . . . . Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts . . . must give effect to the contractual rights and expectations of the parties.

Stolt-Nielsen, __ U.S. at __, 130 S. Ct. at 1773 (internal punctuation omitted).

Brewer rhetorically bemoans the fate of the "thousands of similarly situated victims" of Missouri Title's allegedly improper practices. Br. at 22. If any of these people genuinely believe that Missouri Title has violated their legal rights, they too can arbitrate their individual cases. Only three people have so far chosen to complain. That strongly suggests that this case, like most consumer class actions, is generating litigation that would not otherwise exist, because most consumers are satisfied with their vendors. *Elster v. Alexander*, 76 F.R.D. 440, 443 (N.D. Ga. 1977) ("[t]his Court is unwilling to breathe the spirit of judicial combat into 8,500 persons who, so far, have shown no desire to litigate this matter").

Brewer claims that the "undisputed evidence" is that Missouri Title customers would have "an extraordinarily difficult time" obtaining counsel for individual cases. Br. at 22. That "undisputed evidence" consists of the self-serving speculation of three plaintiffs' lawyers. That kind of speculation does not warrant a finding of unconscionability. *Green Tree*

Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000). As held in *Strand v. U.S. Bank N.A.*, 693 N.W.2d 918 (N.D. 2005):

> Strand points to no empirical evidence that **all** attorneys would be unwilling to litigate these claims. Strand's attorney filed an affidavit stating that *he* would not accept individual cases involving the amounts at issue here. That is not, however, evidence that *no* attorney would be willing to accept such cases, particularly where attorney fees are available for prevailing plaintiffs.

693 N.W.2d at 926 (bold and underline added; italics original).

The petition presented substantial empirical evidence that lawyers will take low-dollar consumer cases when there are statutory attorneys' fees provisions. Unable to respond to that evidence, Brewer asserts that it is "made up out of thin air." Br. at 24. The numerous cases in which Missouri lawyers did take such cases, including several by Brewer's alleged expert, are not "made up out of thin air." The 1999 Fair Debt Collection Practices Act cases filed by private counsel in the United States District Court for the Eastern District of Missouri in less than six months are not "made up out of thin air." The numerous state and federal opinions squarely holding that statutory attorneys' fees are sufficient to attract competent counsel are not "made up out of thin air."

Brewer complains that Missouri Title has not attached the actual language of the arbitration clause, because it is of a kind "used like big sticks to beat customers." Br. at 24-25. The precise terms of that clause are quite irrelevant to this petition, given

the breadth of the holding below. To repeat, that holding is that, absent consent to a class action, Missouri courts will not enforce arbitration clauses in cases involving damages of $4,000 or less. That effectively prohibits arbitration in most consumer cases.

III. MISSOURI COURTS CONTRAVENE THE FAA BY DISCRIMINATING AGAINST ARBITRATION PROVISIONS IN PRACTICE.

The petition established that, whatever lip service Missouri courts pay to arbitration, in practice they treat those agreements much more harshly than others. Continued at-will employment is sufficient consideration for every other kind of contract – but not arbitration. Contractual provisions that make a case less attractive to a lawyer are perfectly acceptable in other contexts – but not arbitration. A defense to every other contract requires both procedural and substantive unconscionability – but not arbitration.

Brewer attempts to respond only to the unconscionability issue. She argues that there are procedural and substantive "aspects" of unconscionability; that the two often go hand in hand; and that the majority opinion found procedural unconscionability. Br. at 18-20.

These arguments miss the point. The majority opinion squarely held that "there are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone." App. 6a. The only cases so holding, however, involve arbitration clauses. As the dissent states, the general rule in Missouri is that "a contract will not be voided for unconscionability unless it is both procedurally and substantively unconscionable." App. 14a.

This is clear evidence that Missouri courts do not, in practice, apply the same rules to arbitration clauses that they apply to other kinds of contracts. That discrimination violates the FAA.

CONCLUSION

For these reasons, petitioner Missouri Title Loans, Inc. respectfully prays that the Court grant its petition for a writ of certiorari.

Respectfully submitted,

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